PRINCIPLES OF JURISPRUDENCE

(For the use of Law Students)

BY

A VAKIL.

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Thoroughly revised

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PRINCIPLES OF JURISPRUDENCE

INTRODUCTION.

The Methods of Jurisprudence.

The three chief methods.

The Methods employed in carrying on juridicial investigations are, according to Professor Gray chiefly three. They may be called (1) the Analytical Method, (2) the Historical Method, otherwise called the Systematic or Dogmatic Method and (3) the Ethical or Deontological Method.

(1) Analytical method deals with law as it is.

(1) **The Analytical Method.** The jurists who apply the Analytical Method take law as it is and try to analyse the existing legal conceptions. This Method was applied by Bodin and Hobbes. Austin and Holland[1] also belong to the Analytical School.

Its merits.

The *advantages* of the Analytical Method are that (*a*) it enables the jurist to have clear ideas of legal conceptions and (*b*) helps the detection of absurdities in legal doctrines.

Its demerits.

The analytical method has its *drawbacks* as well, (*a*) It begets in the jurist a fond attachment for

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1 It was Professor Holland who systematised and scientifically completed the work begun by Hobbes. His Jurisprudence was published in 1880. It is characterised by Sir F. Pollock as the first work of pure scientific jurisprudence which appeared in Engalnd.

his dogmas and inclines him to take them as final, who thus becomes blind to their past history and possibilities of future development. (*b*) The Analytical jurist is likely to forget the utility of his science as a practical study and his method may "result in a barren scholasticism."[2]

(2) Historical method explains the development

(2) **The Historical Method.** As applied to Jurisprudence it is the business of the Historical Method to establish a historical connection between law as it has been and law as it is and to explain the course of development. The name of Montesquieu is definitely connected with the beginnings of the historical method. Savigny, Maine and Ihering belong to the Historical School The Historical method has its merits as well as disadvantages. Its *merits* are :—(*a*) it helps the understanding of the nature of legal institutions and explains their anomalies [3] Under the influence of this Method of study, jurists have understood that "the matter of legal science is not an ideal result of ethical and political analysis; it is the actual result of the facts of human nature and history " (Pollock and Maitland; (*b*) it "helps to distinguish those parts of the law which correspond to modern ideas from those which are survivals of an earlier age." The *demerits* of the

Its merits.

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2 "Jurisprudence is a word which stinks in the nostrils of a practising barrister " Professor Dicey 5 Law Mag. & Rev 4th series 382.

3 " The difficulty of remembering legal doctrines which have no present rational excuse for being is alleviated, if we can trace them to the times when they had their origin." (Gray.)

method are :—(*a*) that it fosters academic discussions at the cost of practical study and (*b*) "hinders the grasping of law of the present time as a whole;" (*c*) moreover, as Mr. Bryce remarks, it is more applicable to the law of any particular country than to the theory of law in general. Its demerits

(3) **The Ethical Method.** The jurists who follow the Ethical or Deontological Method busy themselves with the considerations of law as it ought to be, *i.e.*, its fitness or unfitness to meet the requirements of society. According to Sir H. Maine, Bentham belongs to this school. The great *merit* of this school lies in its regard for the future improvement of legal institutions and in the help it offers to the legislator (3) The Ethical method deals with law as it should be

Its merits.

It has a *disadvantage* in so far as it resorts to the dangerous practice of relying on the conscious efforts of theorists for the development of law. Its demerits

Besides these three methods, mentioned by Professor Gray as the chief ones, there are two others, *viz*, the *Philosophical*[4] and the *Comparative*. The jurists of the *Philosophical* School start with a—priori assumptions of first principles and try to build up an ideal code resting on these assumptions. Both the Philosophical and the Ethical Methods look to the (4) Philosophical method starts with a-priori assumptions and tries to build an ideal code.

[4] According to Professor Clarke the Historical and the Analytical schools arose by way of revolt against the Philosophical School.

The difference between the Ethical and the Philosophical methods.

iedal future, but there is this difference between them, that whereas the latter starts with an a-posteriori notion of law as it is, the former starts with a-priori assumptions of first principles.

(5) The comparative method.

In the Comparative Method, two or more legal systems are compared together, to find out their resemblances and differences so that the true character of both or all may be better grasped According to Mr. Bryce it is simply an extension of the Historical Method of which it is but a branch This method may be applied to the study of a system as a whole or of particular legal topics Thus the comparison, given by Mr Justice Holmes, in his Common Law of the English theory of possession with the Roman theory, helps the understanding of both the English as well as the Roman Law of possession

All the methods are mutually interdependent

But none of these mehods is really self-sufficient. Indeed they act and re-act upon each other. Even Austin, the most stringent of the analytical jurists, admits that the consideration of Law as it is cannot be thoroughly dissociated from a study of Law as it should be.

The standpoint of the present treatise is analytical.

In the present treatise we shall chiefly follow the Analytical Method but we shall also seek the aid of the other methods whenever necessary.

CHAPTER I

The Science of Jurisprudence.

Having discussed the various methods of juridical enquiries and having premised that we shall chiefly follow the Analytical Method in this treatise, let us enquire how the science has been defined by the jurists of the Analytical school

Jurisprudence defined. "Jurisprudence," says Professor Holland, "is the formal science of Positive Law."

Definition of jurisprudence. (Holland.)

The definition needs explanation. Jurisprudence is, first of all, a *science*, that is to say, it tries to generalise and systematise the principles that underlie legal rules

(1) It is a science.

It is again a *formal* as opposed to a material science, because it deals rather with the various relations that are regulated by legal rules than with the rules themselves It thus presents many analogies to abstract grammer, wihch is the formal science of language, that is to say, a science of the ideas of relations which are observed as underlying the languages of mankind.

(2) It is a formal and not a material science.

The distinction illustrated. The distinction between a formal and a material science may be made clear by an illustration. If a jurist learns all the rules of the various civilised

The distinction illustrated.

Jurisprudence and comparative law distinguished.

systems of law, he may be said to be well versed in comparative law. If he next tries to have a systematic knowledge of the rules that are common to all the systems, his knowledge is that of a material science of law. But behind all these rules, there are some ideas and relations which are common to most, if not all, systems of law. "Despite the variety and number of changes in the law, there are permanent elements or at least some so stable that they do not change at the same time with any definite new legislation" (Korkunov). The needs of societies are often identical. Identical social needs give rise to identity of notions, principles and distinctions, and have also to be met by identical rules. Now if the jurist formulates a scheme of these notions, principles and distinctions, common to the various systems, his knowledge will be that of a formal science of law. Thus, the idea that property may pass without conveyance (*e.g.*, by prescription, *i.e.*, possession through lapse of time) is common to all systems of law. This idea, therefore, is the subject-matter of a formal science of law The various rules that have been laid down under the various systems, to give effect to this idea, form the subject-matter of a material science of law.

Another illustration.

(3) It is a science of positive law.

Lastly, according to the definition, Jurisprudence is a *science of positive law*, *i.e.*, law established in an independent political community by the express or tacit authority of its sovereign or supreme government. The con-

ception of Positive Law will be fully discussed in the next chapter.

Criticism of Holland's Definiton. Austin regards Jurisprudence as a science of positive law.[1] Holland, his disciple, has further narrowed down the scope of the science by calling it a formal, as opposed to a material science. So in examining the position of Professor Holland we must ask ourselves two questions: (1) Is Jurisprudence a formal science only? and (2) Is it a science of positive law?

Holland's definition criticised.

How Holland even restricts Austin's definition.

(1) *Is Jurisprudence only a formal science?* No. It is not only a formal but also a material science. No doubt, the general conceptions and principles underlying the detailed legal rules pertain to a science of law. But why restrict the science to this branch of legal knowledge only? Jurisprudence is scientific study of law, as well of the legal rules, as of the notions and conceptions underlying them and the attempt to restrict its scope to the latter, seems to be unsupportable. Nor is a purely abstract or formal science of law possible. As Sir F. Pollock observes, an abstract legal science dissociated from concrete legal rules is

Is Jurisprudence only a formal science?

Jurisprudence is a science of law not only of the legal notions but of the legal rules also. Sir F. Pollock.

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1 In foreign literature Jurisprudence and its synonyms include the whole of legal science and are never used in this specific and limited signification—Salmond.

A treatise of Jurisprudence may go into the minutes particulars, or be confined to the most general doctrines, and in either case deserves its name; what is essential to it, is that it should be an orderly, scientific treatise in which the subjects are duly classified and subirdinated—Gray.

Is Jurisprudence a science of positive law only?

as impossible as an abstract grammar unconnected with the rules of language. The force of this contention is borne out by the fact that even Professor Holland has often discussed abstract principles by a reference to concrete rules, *e.g.*, his discussion of rights in personam by a reference to rules of English Contract Law.

(2) Next, *is Jurisprudence a science of positive law only*? Now two ideas are involved in the expression 'Positive Law': (*a*) It denotes law as it is and (*b*) connotes that law is established by sovereign political authority. But it has been argued that Jurisprudence is neither merely a science of law as it is, nor a science only of law established by sovereign political authority. First of all a science of law, in order to be comprehensive, should include in its scope considerations of the past history of law as well as its future developments. Again, the idea of excluding all laws, not established by sovereign political authority, from the province of Jurisprudence has not been favoured by many, as for instance those who regard International Law as law proper.

Conclusion.

Concluusion. In conclusion, we may notice that if in defining Jurisprudence, we seek to specify the branch of systematised knowledge to which the term Jurisprudence may be applied consistently with its original significance, we must define it as the 'science of law,' meaning by law all species of obligatory rules of human action. But if the science be looked at from

a particular pont of view, that is to say, if its province be narrowed, there may be various definitions, none of which will be exhaustive. Therefore, when we adopt one such definition, we should not deny that other definitions, are possible. Now in this sense Professor Holland's definition is not exhaustive. But, notwithstanding the criticisms levelled against it, we accept it for the purposes of the present treatise. For, here we are concerned chiefly with looking at the science of law from the point of view of a student anxious to get at the first principles as a preparation for the study of law as current in the law courts. And the definition of Jurisprudence as the "formal science of Positive Law" fully meets our present requirements.

The standpoint of the present treatise.

Is the Science divisible into General and Particular? Austin draws a distinction between General and Particular Jurisprudence. General Jurisprudence is the science concerned with the exposition of the principles, notions, and distinctions common to the ampler and maturer systems of law. Particular Jurisprudence is the science of the rules of any such system of law.

Austin divides Jurisprudence into general and particular.

But Professor Holland objects to the term Particular Jurisprudence. According to him there is no such thing as Particular Jurisprudence, and therefore the epithet General is unnecessary.

Holland objects that 'general' is superfluous as 'particular' is non-existent.

For, Particular Jurisprudence, may mean either of two things: (1) A science derived

Holland's argument.

from the observation of the laws of one country only; or (2) knowledge of the laws of a particular people. But in the first case, it is the materials that are particular (being drawn from one system) and not the science itself; for it is quite possible to construct a science of law from the examination of one system only. A science consists of generalisations. "The wider the field of observation, the greater of course will be the chance of the principles of a science being rightly and completely enunciated; but so far as they are scientific truths at all, they are always general and of universal application." The science does not become particular because the generalisations are drawn from a limited source. In the second case, it is no Jurisprudence, for empirical knowledge of the rules of Law is no science at all.

Criticism of Holland.

Holland criticised. Although empirical knowledge of the rules of one country is not a science, there is no reason why a systematised knowledge of such rules should not be called a science. We have already shown that properly speaking Jurisprudence is not only a formal but also a material science. It is desirable to have a special term to designate the acquaintance with the law of particular people and this is what is called Particular Jurisprudence. Of course, if we accept Holland's definition of Jurisprudence as a formal science, the conclusion is irresistible that there can be no such thing as 'Particular Jurisprudence.'

If Jurisprudence is ont only a formal but also a material science of law, then the term particular Jurisprudence is harmless.

Is the Science divisible into Historical and Philosophical? Although according to Holland

the science of Jurisprudence is divisible into as many branches as there are departments of law, civil and criminal, public and private, its division into Historical and Philosophical is as improper as its division into Particular and General.[2]

Holland objects to the division of the science into historical and philosophical.

Jurisprudence has close connections with History, in as much as the facts forming the basis of juristic generalisations are furnished by

[2] Salmond's division of Jurisprudence.

Jurisprudence
(= science of law
rule of human action).

Civil	*International*	*Natural*
i.e., science of law recognised by the Judiciary.	*i.e.*, science of law of the nations.	*i.e.*, science of natural law and justice

Theoretical	*Practical*
i.e., science of the first principles.	*i.e.*, science of the rules of law.

Historical	*Systematic*	*Critical*
i.e., *of law* as it has been.	*i.e.*, of law as it is.	*i.e.*, of law as it ought to be.

N.B.—Thus Salmond's Civil Law roughly corresponds to Holland's Positive Law. (Note in this connection the attempts of the followers of Austin to show that his conception of Positive Law is wide enough to include all rules which are acted upon by courts of Law.) So only what Salmond would call Theoretical Civil Jurisprudence is according to Holland worth the name of the Science.

History. Jurisprudence need not enter into a consideration of these facts. As Professor Holland says 'the task of Jurisprudence begins when these facts begin to fall into an order other than the historical.' Similarly Jurisprudence is allied to Philosophy (Ethics and Metaphysics). Many of its arguments are based on Ethics. But the Ethical doctrines are, nevertheless, no province of jurisprudence. Thus, although Historical or Philosophical discussions may prevail in the one or the other work on Jurisprudence, the science cannot properly be divided into Historical or Philosophical.

Criticism of Holland

Holland criticised. As already pointed out if we accept Holland's standpoint, (*viz.*, the formal character of the science) Jurisprudence cannot be divided into Historical and Philosophical. But we have shown that Jurisprudence is not merely a formal science. There is no reason why systematised study of the explanation of legal development should not be considered a part of the science of Law. Thus the division is not quite untenable, and it may be said that while Philosophical or Analytical Jurisprudence is the formal science of the first principles of positive Law, Historical Jurisprudence is the Historical development of Philosophical Jurisprudence. To examine any legal idea, sovereignty for example, is the function of the analytical jurist. To trace the history of that idea in relation to other ideas of the same kind is the function of the historical jurist.

Historical Jurisprudence

Historical Jurisprudence and Legal History. Historical Jurisprudence, however,

is different from legal history, which traces the history of a law without reference to its bearing upon the rest of the legal system. "For example, an outline of the law of wills from Anglo-Saxon times to the present day would be a branch of legal History. But a sketch of the power of disposing of real and personal property by will, as illustrating the change from "status" to contract, would come under Historical Jurisprudence" (Wise and Winfield). distinguished from Legal History.

Is Jurisprudence a Progressive Science? According to Holland, Jurisprudence is a science of law as it is, and therefore it changes to keep pace with change in legal rules. "Its broader distinctions," says he, "corresponding to deep seated human characteristics will no doubt be permanent but, as time goes on, new distinctions must be constantly developed, with a view to the co-ordination of the ever increasing variety of legal phenomena" He therefore calls it a progressive science [3] Is the science progressive? Holland answers "yes."

The need of a Science of Law. We have now finished our discussion of the nature of Jurisprudence. The question naturally arises—is there any need of the science, the nature of which is such a bone of contention amongst juridicial thinkers? The study of the science of law is not of mere academic importance but it has practical usefulness as well. What is the need of Jurisprudence as a science?

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3 Mr. Buckland says "The fact that principles of Law change, Professor Holland admits, by calling Jurisprudence a progressive science. This admission is somewhat startling. A writer on the Jurisprudence of a single nation might make it readily

But for the existence of such a science it would almost be impossible to master the legal rules which are ever increasing owing to the growth of complexities of human relations. The difficulty is less where there are codes of law arranging the detailed rules under various categories. But an uncodified system can only be learnt by a student of Jurisprudence, who knows the principles underlying the legal rules. Thus, Austin says, that a student of Jurisprudence can easily master any system of law.[4]

Whence does the name Jurisprudence come? From the Romans

Whence does the name Jurisprudence come? The science of Jurisprudence as well as its name are of Roman origin

The term originally meant only knowledge of law

At first the Romans had no idea of a science of law. Their language had several phrases signifying a knowledge of Law, e.g., 'Jurisprudentia,' 'Juris-scientia,' 'Legum prudentia' etc. Thus the term 'Jurisprudentia' (juris, law and prudentia, knowledge) originally meant 'a knowledge of law' Ultimately when the

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enough But what is likely to be the fate of a principle found in the law of say, the states which go on developing on different lines? The probabilities are against its continuance as a general principle. And the notion that some other general principle will arise to take its place appears to be rather an article of faith than a proposition on which a science can be based "

6 Law Quarterly Review 444.

4 According to Austin there is no truth in the common saying that the study of the science of Jurisprudence tends to disqualify the student for the practice of law or to inspire him with an aversion from the practice of it.

Romans conceived the idea of a science of legal principles, they called that science 'Jurisprudentia' or 'Jurisprudence'—an expression which originally meant nothing more than a knowledge of law.

The Romans had then no idea of a legal science.

The evolution of Roman thought, culminating in the recognition of a science of Law is worthy of note. At first the Roman conception of legal knowledge was thoroughly practical. That it was so, is clear from Cicero's description of a Jurisconsult, as a person well versed in current laws and usages and competent to give opinions on legal matters and directions to the clients in the conduct of suits. Later on, this practical conception was superseded by a philosophical one. Thus even Cicero, in his later works mentions Jurisprudence amongst sciences which seek for truth. To the same effect is Ulpian's definition of Jurisprudence as the knowledge of things divine and human, the science, which teaches man to discern the just from the unjust. Thus we find that in later times knowledge of Law came to be considered by the Romans as a branch of philosophy They thus attained to the idea of a science of Law.

How did they come to have an idea of a legal science?

Having attained to the idea of a science of law,

they called it 'Jurisprudence' although the term meant

Although the term Jurisprudence does not literally mean a science of law yet the Romans had to use it as they could not borrow any name from Greek Philosophy for a science which originated with themselves.

'knowledge' and not science;

because no term from Greek philosophy

Nor have the modern nations considered themselves free to use a better substitute, habi-

could be borrowed, the science being indigenous.

tuated as they are to call their sciences by classical names Greek or Roman.

But the term has also been improperly used.

Improper uses of the term. We thus see that the literal meaning of the term Jurisprudence had to be strained in order to make it applicable to a science of law. But the history of the use of the term does not end there. It has some improper uses:

(1) *e.g.* to mean law.

(1) Thus sometimes it is used in the sense of 'Law,' *e.g.*, in the expressions 'Equity Jurisprudence' (which means nothing more than the Law administered in Equity courts), 'German Jurisprudence,' 'American Jurisprudence' etc.

Bentham's division of Jurisprudence into expository and censorial.

Bentham has used the term in this sense. He therefore, divides Jurisprudence[5] into (1) *Expository*, which explains Law as it is, and (2) *Censorial*, which deals with Law as it ought to be. Expository Jurisprudence is again subdivided into (*a*) *Authoritative*, *i.e.*, emanating from the legislative authority and (*b*) *Unautho*

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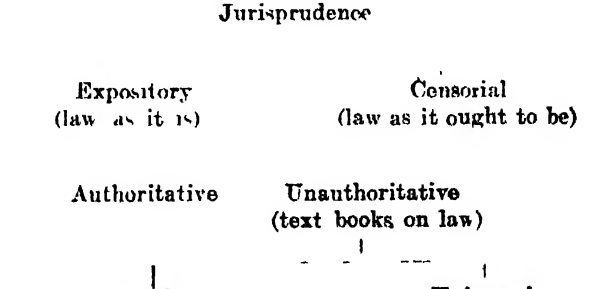
[5] Bentham's Division of Jurisprudence



relative, i.e., comprising the text-books on law. Unauthoritative jurisprudence is further, either (x) Local or (y) Universal. It is Local, when text-books are written with reference to the law of any particular country. It is universal, when the text books are not written with such reference. But according to Holland, this division and sub-division is wrong, as 'Jurisprudence,' should not be used to mean law, and what Bentham calls Unauthoritative Universal Jurisprudence should alone be called Jurisprudence.

(2) To denote current view of law.

(2) The term Jurisprudence is also improperly used to denote a current view of the Law, *e.g.*, the French use of such phrases as 'Jurisprudence constante,' 'Jurisprudence des arrets de la cour de cassation.'[6]

(3) The third improper use of the term occurs in connection with such expression as 'Medical Jurisprudence', which means those medical truths, a knowledge of which is important in legal proceedings. Thus works on so-called Medical Jurisprudence contain information which might be useful to lawyers in cases of poisoning etc. Similarly we have got the expression 'Architectural Jurisprudence,' " Builders Jurisprudence " 'Veterinary Jurisprudence' etc. These have nothing to do with Law and hence the use of the term Jurisprudence in their connection is highly improper.

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[6] But Professor Gray does not object to this use of the term. 'Nature and Sources of Law' p. 129.

Relation of Jurisprudence to Ethics.

Relation of Jurisprudence to other sciences. (1) *To Ethics.* The place of Jurisprudence in a classification of the sciences will be considered in the next chapter. Jurisprudence is a social science[7] and is closely related to some of the other social sciences. Thus, for instance, in its critical side, it is related to Ethics. Analytical Jurisprudence, of course, is directly concerned only with laws as they are. But if we take jurisprudence in a wide sense, we may say that critical Jurisprudence is closely related to Ethics, for the former is helped by the latter to distinguish good from bad. Every system of law, especially on its penal side, is an instance of applied morals. Criminal legislation of a country, for instance, embodies its public standard of right and wrong.

Relation of Jurisprudence to politics.

(2) *To Politics.* Jurisprudence is a branch of the formal science of Politics. The latter considers the causes, purposes, limits and methods of the influence of Government on human conduct. Being a formal science, it does not answer such questions as (*a*) what is

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7 "Juisprudence," says Professor Vinogradoff, "is a branch of the social sciences." (Common Sense in law). Man is a social animal. Social intercourse to him is a dictate of nature, for he cannot satisfy his wants as an isolated individual. To make peaceful social intercourse possible, some kind of regularity should be introduced in it. Rules of conduct should intervene to settle the normal behaviour of man in society. Laws which are the subject-matter of Jurisprudence are a kind of these rules of conduct which ensure social order and intercourse. Hence Jurisprudence is one of the social sciences.

the use of a Parliament, and (*b*) what laws should Parliament make; for these are topics of a material science. Jurisprudence answers the question by what instrument does Government exert its influence? The methods of Government influence are the subject-matter of Politics and these methods being everywhere the same, *viz.*, the enforcement of general rules of conduct known as positive laws, Jurisprudence is to be considered as a branch of Politics.

CHAPTER II

Positive Law.

Jurisprudence has been defined as the formal science of Positive Law. Our object in the present chapter is to form a clear conception of Positive Law To do so, we must differentiate it from other kinds of Law and indicate its limits clearly.

What is law?

Law. First of all what is Law? Bentham says "Law or the law[1] taken indefinitely is an abstract or collective term, which when it means anything, can mean neither more nor less than the sum-total of a number of individual laws, taken together" If law means a number of individual laws, the question arises, what are these individual laws?

Bentham and Austin would hold that the individual laws are but the commands of the state. But the question is nc free from difficulty.

Indeed the term law is used in a variety of senses and although it is free from the ambiguity which attaches to its Latin, German and French

Difference between 'a law' and 'the law.'

[1] *Difference between 'A Law' and 'The Law.'* Professor Gray suggests that 'A Law' ordinarily means a statute passed by the legislature of a state. 'The Law' means the whole system of rules applied by the courts. Thus Prof. Gray seems to object to Bentham's definition of 'The Law.'

equivalents (Jus, Recht and Droit), each of which not only means law but also right and justice, the term is suggestive of numerous meanings. We shall consider these meanings in the subsequent paragraphs.

'Law' is free from the ambiguity attaching to its foreign equivalents.

A. Law in general: A Rule of Action.

Widest sense. In its widest sense, the term law means a rule of action, *i.e.*, "any standard or pattern to which actions should conform." These actions may be either of (1) nature or of (2) rational beings. The actions of nature are nothing but the regularities of natural operation—the order of the universe—which give rise to physical or natural laws; *e.g.*, **laws of gravitation**, laws of chemical combination etc. These laws are called *Laws by Metaphor* and are outside the scope of jurisprudence In Jurisprudence the term 'law' means a rule of human action. But we shall see later on that all rules of human action are not Juristic (Positive) laws To know which of the rules of human action are juristic laws, we shall have to classify those rules This will be done in the next section (Section B).

In its widest sense Law means a rule of action.

(1) Either the order of the universe —Laws by metaphor; or

(2) Law proper, i.e., a rule of human action.

History of the various uses of the term. Let us in the meantime enquire, how law which properly means a rule of human action, metaphorically came to signify the uniformity of nature.

History of the original and the derivative meanings.

The use of the term in the metaphorical sense is derived from the idea of law as a com-

Original idea:

A command. Physical regularities thought to be due to God's commands.

mand. The earliest laws were the commands of the shepherd to his flock and of a paterfamilias to his dependants. Observing the regularities of physical phenomena, man is led to supose, that just as the regularities in the actions of his own flock and family are due to his own commands, so the order in physical phenomena is due to the commands of an unseen being (God).[2]

The confusion of ideas due to what?

This confusion of ideas was due to the fact that the ancients were not accustomed to consider the different sciences separately. They studied the world, with its varied phenomena, as a whole.

Separation of the sciences: physical and practical. But in course of time the entire study of the world came to be broken up into

The conception of Lex Aeterna.

Its two divisions.

The modern idea of physical law

[2] *Lex Aeterna* The primary source of this conception is to be found in the Hebrew scriptures and the secondary and immediate source in the scholasticism of the Middle Ages. * * * The Bible constantly speaks of the Diety as governing the universe, animate and inanimate, just as a ruler governs a society of man. * * * This Lex Aeterna, according to St Thomas Aquinas, is the ordinance of the divine wisdom, by which all things in heaven and earth are governed. * * * This *Lex Aeterna* was divided by the schoolmen into two parts. One of these was that which governed the actions of men. * * * The other is that which governs the actions of all other created things. * * * The modern use of the term law in the sense of physical or natural law, to indicate the uniformities of nature, is directly derived from the scholastic theory of the *Lex Aeterna;* but the theological conception of divine legislation

different problems and hence arose a division of the sciences. The first division was between the (1) *Theoretical* and the (2) *Practical* sciences. The former deal with external nature, and in them, laws (physical or natural laws) are observed to be the regularities of physical phenomena, due to forces of nature or God's will. The latter are concerned with human actions and in them laws are rules of human action.

The confusion disappears with the division of sciences. Sciences divided into: (1) Theoretical. (2) Practical.

B. Law: A Rule of Human Action.

Common characteristics of all rules of human action. In order to get at positive law, which is one kind of rules of human action, we shall have to carry further our division of the sciences. But before we do this (in the next paragraph), let us observe that rules of human action—which are of various varieties (*e.g.*, laws of etiquette, laws of honour, laws of morality, positive laws etc.,)—have some characteristics in common.

The common characteristics of the various rules of human action:

Thus (1) they all are or may be expressed as distinct propositions addressed to the will of a rational being; (2) they are those propositions that are commands (not those that are counsels); (3) they are accompanied by a sanction, *i.e.*, an intimation, express or implied, that an evil would follow their non-observance; (4) lastly they are general commands, prescrib-

(1) Distinct propositions.

(2) Commands.

(3) With a sanction.

is derived from this conception.

on whch is was orignally based is now eliminated or disregarded. Salmond, Jurisprudence, pp. 40—42.

(4) A general command.

ing a course of action[3] as opposed to special commands which enjoin only a particular action.

Division of the sciences continued.

Practical sciences divided into (a) Ethics. (b) Nomology.

Further division of sciences. We have already divided the sciences into (1) physical and (2) practical. The practical sciences may be subdivided into (*a*) *Ethics* and (*b*) *Nomology*. Ethics is the science which deals with the human will, irrespective of outward manifestations in acts. Nomology (as Holland calls it) is the science which deals with the states of human will, only as manifested in action. Thus Ethics looks to the conformity of human *will* to a standard, whereas Nomology considers whether human *actions* conform to a type.

Different views as to the meaning of the generality of commands.

[3] *Different views on the generality of a command.* The above is Austin's view of the generality of a command. Austin says that according to Blackstone, a command would be general if it was addressed to a class of persons (even if it enjoined a particular act or forbearance). Professor Clarke shows (Practical Jurisprudence p. 112) that Austin has misunderstood Blackstone. According to him Blackstone would call a command general if it meant a standing order as distinguished from an occasional one. Esmein (French Jurist) also proposes the test of perpetuity. Maine (Early History of Inst., p. 392) would combine both the tests, *i.e.* prescribing a course of action and being addressed to a class of persons. Amos (Science of Jurisprudence. p. 74) discards both the tests as useless and misleading. "The most apparently isolated decree" says he, "if imperative and peremptory, is addressed to all the members of the Executive needed to carry it into effect, and to all persons in the community capable of interfering with its being carried into effect."

Nomology sub-divided. Nomology may be sub-divided into (1) a science of the rules enforced by an indeterminate authority and (2) a science of the rules enforced by a determinate authority. Nomology sub-divided.

I. **Rules set by indeterminate authority.** There are certain rules of human actions which are neither imposed, nor is their infraction punished, by any determinate authority. These are not juristic laws. Their observance is followed by social good will, and disobedience by ridicule, hatred or censure. They are of various sorts. Chief of them are the rules of fashion or etiquette, rules of honour and rules of morality. The rules of fashion or etiquette and rules of honour are merely conventional and arise to suit the peculiar temperament of particular soc'eties. I. Rules set by indeterminate authority. Examples.

Moral Rules. By far the most important of the rules enforced by no determinate authority are the rules of morality. These rules are not of state creation but rest upon public sentiment. They are universal, being principles of right and wrong discoverable by an innate faculty. They have grown, as Professor Holland remarks, partly under the influence of religion, partly out of speculative theories and partly out of the necessities of existence. Moral rules: The most important of them. Their ature. Their origin.

The sanction of moral laws. Although the moral rules are not enforced by any determinate authority, they are not without a sanction Their sanction.

(see p. 23)[4] *i.e.*, no man escapes censure or dislike who offends against them.

Law of nature and law of nations are varieties of moral laws.

Law of nature and law of nations. The most important kind of moral rules is the law of naure, of which, the law of nations may be said to be an off-shoot. For a detailed treatment of the Law of Nature, see Appendix A.

II Rules set by determinate authority (a) By determinate divine authority (b) By determinate human authority

II Rules Set by determinate authority divided. Divine and Human Laws. The second branch into which nomology may be divided, *i.e* , the rules emanating from a determinate authority are either (*a*) rules emanating from a determinate divine authority or (*b*) rules enforced by a determinate human authority

(a) Laws of God

(*a*) **Laws of God.** The rules enforced by the divine authority, either directly through Revelation (*e g* , the Vedas) or indirectly through the human faculty called conscience,[5] may be described as Laws of God The violations of these laws are sins and are punished with divine displeasure, the nature of which varies according to different religious systems. The science which treats of these laws is Theology and with them Jurisprudence has nothing to do.

[4] According to Thomasius, as Holland points out, moral laws are without a compulsion They thus differ from positive laws We can agree with Thomasius if he means by compulsion, state compulsion only For we have seen above that moral rules are not without a sanction.

[5] According to the Emotional Intuition Theory, See Clarke—Practical Jurisprudence, p. 119.

Laws of God compared with Positive Laws. Laws of God are *similar* to Positive Laws in as much as (1) the former have got a determinate source, and (2) as a sanction, *viz.*, divine displeasure, attaches to them. They also *differ*, for (1) whereas the Laws of God have a (determinate) divine source, human laws are set by determinate human authority and (2) as the sanction that attaches to human laws refers only to temporal reward or punishment.

Laws of God compared with positive laws: Similarity.

Difference.

(*b*) **Human Laws.**[6] The second class of rules enforced by determinate authority, *i.e.*, rules set by human authority, may be subdivided into (1) rules set by human authority,

(b) Human Laws subdivided:

6 AUSTIN'S CLASSIFICATION OF LAWS. Austin classifies laws as (*i*) Laws of God; (*ii*) Positive moral rules, which are either (*a*) Laws Proper or (*b*) Laws Improper; (*iii*) Laws Metaphorical; (*iv*) Positive Laws. (*i*) Laws of God are not the subject-matter of Jurisprudence. (*ii*) Positive moral rules which are (*a*) Laws proper are imperative rules set by men to men but not by men as political superiors nor by private persons in pursuance of legal right. They are (1) either set by men living in a state of nature, or (2) set by sovereigns but not as political superiors, *e.g.*, a victorious state exacting war indemnity or (3) by private persons but not in pursuance of legal rights, *e.g.*, a club to its members. These rules are laws proper because they are a species of commands. They are positive because they are of human origin but they are not positive laws because they are not set by sovereign to its subjects. Positive moral rules (*b*) which are laws improper, are imposed by general opinion, *e.g.*, laws of fashion, etc. They are not commands. (*iii*) Laws by metaphor are Laws of Natnure, etc. (*iv*) Positive Laws are general commands set by a political superior to a political inferior.

(1) Set by no sovereign political authority. (2) Set by sovereign political authority.

not having sovereign political superiority, (e.g., commands of the father to his sons) and (2) rules set by human authority, being also the sovereign political authority.

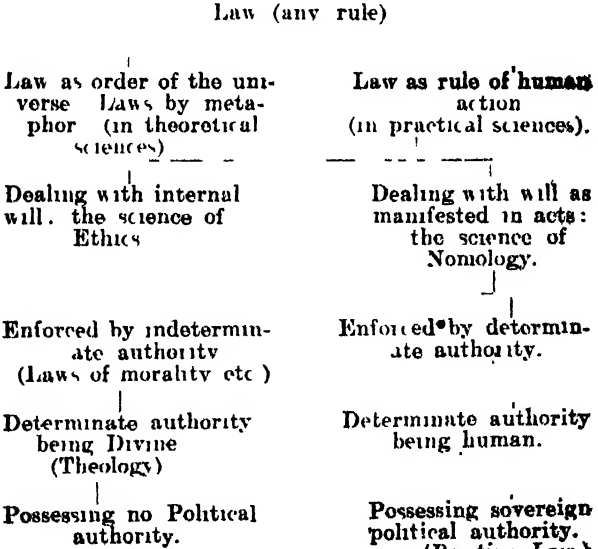
C. Positive Law.

Which are positive Laws.

The last mentioned rules, that is, those set by sovereign political authority are known as Positive Laws

The divisions in a tabular form.

The foregoing divisions and sub-divisions may be arranged in a tabular form



For Austin's analysis, see page 30.

Positive Law defined. Referring to the foregoing table, we find, that Positive Law is (1) a rule; (2) it is a rule of human action; (3) it is a general rule; (4) it relates to external acts; (5) it is set by a determinate authority; (6) that authority is human, (7) that authority is also the sovereign political authority.

The definition of Positive Law analysed.

Combining all these elements of the definition, we may shortly define Positive Law as "*a general rule of external human action enforced by a sovereign political authority*" (Holland)[7]

It is a general rule of 'external' human action enforced by a sovereign political authority. Why is it called positive?

It is called positive law because it is *positum* or established in the community by human authority [8]

Laws by metaphor. The rules which govern the inanimate action, *i e*, the regularities observable in nature (which are the subject-matter of the Physical Science) are Laws by metaphor only

Laws by metaphor

Laws by Analogy. Those rules of human action which are not positive laws, that is to

Laws by analogy.

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[7] For criticisms see Chap III

[8] Origin of the term Positive Law The term Civil Law though once in common use to indicate the law of the land, has been partly superseded in recent times by the improper substitute Positive Law *Jus positivum* was a title invented by mediaeval jurists to denote law made or established (positum) by human authority as opposed to the *Juris naturale* which was uncreated and immutable It is from this contrast that the term derived all its point and significance It is not permissible, therefore, to confine Positive Law to the law of the land All is positive which is not natural. International and Canon Law for example, are kinds of *Jus-positivum* no less than the Civil Law itself. Salmond

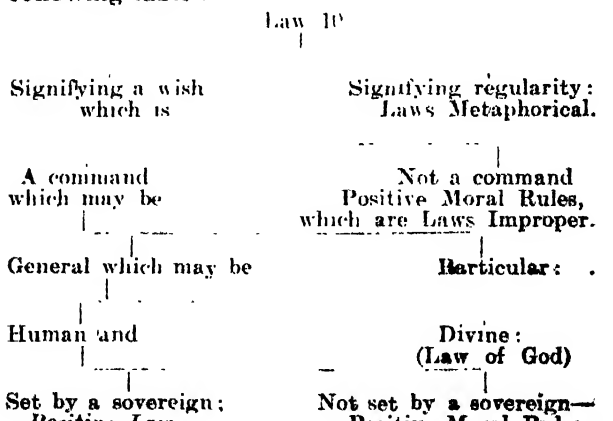
Origin of the term positive from the contrast between jus-positivum and jus naturale.

say, which are either set by indeterminate authority or being set by determinate authority, do not emanate from the sovereign political authority are called Laws by analogy.

Austin's division of Law.

Analysis of Law: Holland and Austin. The conception of Positive Law[9] and the analysis of law mentioned in this Chapter are those given by Professor Holland who is a follower of the analytical or the English School of Jurisprudence, the greatest representative of which is John Austin. So far as the analysis of law is concerned, there is a little difference between Austin and Holland.

We have already given Holland's analysis. Austin's division may be represented by the following table:—



[9] The theory of law and sovereignty given by Austin was derived from his great predecessors. Hobbes and Jeremy Bentham. The reception of the idea of sovereignty in England must be chiefly attributed to the writings of Hobbes but it was the great French publicist Bodin by whom it was originated.

[10] Wise and Winfield, p. 16.

CHAPTER III

The Various Theories of Law.

Four theories of Law. Besides Austin's theory, there are three other theories of the nature of Law. Let us notice each of these four in detail :— Four theories of law.

1. **Austin's theory.** According to Austin, law* is made up of the commands of the sovereign. But what is a command? 1. Austinian theory: Law is a command.

Command analysed. A command involves (*a*) a wish or desire conceived by one rational being that another rational being shall do or forbear, (*b*) an evil to proceed from the former and to be incurred by the latter in case of non-compliance with the wish, and (*c*) an expression of the wish by word or other signs. What is a command?

Austin criticised. But the idea that law is a command, imposing an obligation and being accompanied by a sanction, has met with a good deal of criticisms. They are as follows: Austin criticised.

(*i*) *All laws are not expressible as commands.* Mr. Frederic Harrison* argues that some Laws which are admittedly proper subjects for Jurisprudence can be made to exhibit the characteristic of command, obligation and sanction only by a very roundabout process. Such are :— (i) First criticism—all laws not commands of the state.

* Fortnightly Review, 1878, p. 684.

e.g. (a) Enabling statutes.

(*a*) Enabling statutes; These merely permit certain acts, *e.g.*, an act allowing the formation of new parishes. No one is compelled to do any thing under them. How then are they commands?

(b) Law conferring franchises

(*b*) Laws conferring franchises; *e.g.*, certain persons are allowed to sit on juries; where is the command here?

(c) Rules of interpretation and procedure. (d) Explanatory (e) Repealing laws (f) Laws of Imperfect obligation

(*c*) Rules of interpretation and procedure; (*d*) Explanatory (*e*) and Repealing Laws (*f*) as also Laws of Imperfect Obligation.

Answers to the criticism

Answers to this criticism. To the criticism, that some Laws cannot be expressed as commands, some answers have been made; they are the following:—

(1) Austin's answer. They are exceptions

(1) *Austin* Austin admits that the characteristics of command, obligation and sanction cannot be found in Explanatory Laws, Repealing Laws and Laws of Imperfect obligation. He, however, considers these cases as exceptions to the general rule.

(2) Holland's answer.

(2) *Professor Holland* Holland says "Such cases will cease to be anomalous if we recognise that every law is a proposition announcing the will of the state and implying, if not expressing, that the state will give effect only to acts which are in accordance with its will, so announced, while it will punish or at least visit with nullity, any acts of a contrary character."[1]

(3) Brown's answer

(3) *Professor Jethro Brown.* Professor Brown says that although such laws, considered in

1 Holland thus modifies the Austinian theory.

isolation, may not be expressible as commands, yet if they are read along with the whole system it is obvious that they are not exceptions to the general rule. Thus a repealing statute is but a detached part of a whole, along with which it must be read, if its true character is to be determined. When a statute prohibits gambling, and a subsequent one repeals it, by reading the two together we arrive at the result *not* of a law *not expressible as command*, but of the non-existence of law.

(4) The fourth answer.

(4) It has also been suggested by some, in defence of Austin's position, that such laws may be interpreted as commands to the judge or other officer of the sovereign who is to give effect to them. But according to Mr. Harrison, this argument supports Austin only in a roundabout way.

(ii) Second criticism: Command is not the essence of law.

(*ii*) *Command is not the essence of Law.* The second criticism is that even in laws expressible as commands, command is not the essence. For, the general object of law is not to impose duties but to confer rights in the interest of common good.

Answer to the criticism: rights useless without duties.

But to this it may be replied that rights are useless without duties, which imply state-commands.

(iii) The third criticism: It is not a com-

(*iii*) *The source of the command is not the ruler but the state.* "In regarding laws as the commands of the sovereign to the subjects, Austin gave countenance to the inference that law is the arbitrary creation of the ruler." But this, according to the Neo-Austinian[2] school, is

2 As Prof. Jethro Brown would called it.

mand of the ruler but of the state.

a mistake. A law according to them, is a command not of the ruler, but of the state embracing both the ruler and the ruled.[3]

(iv) The philological criticism.

(*iv*) *Austin's definition is inconsistent with its derivation.* This is Professor Clarke's view, and may be called the philological criticism. Prefessor Clarke has shown that the prevading idea in the early terms for law is not so much what is commanded as what is fitting, orderly or regular. Law is not what the sovereign enacts, but what the subjects observe.

(iv) The fifth criticism: The exclusion of International law is a drawback.

(*v*) *International Law is no law according to Austin.* Austin's definition of law, it has been argued, is defective as it leaves out of account the entire body of rules known as International Law, which is relegated to the domain of Positive Morality. See also Appendix A at the end of the book.

Maine's criticisms.

(*The next few criticisms are by Sir Henry Sumner Maine.*)

(vi) The sixth criticism: Auston's idea. is an abstraction, for: (a) The idea of force is given predominance. (b) Law of the past is ignored.

(*vi*) *Austin's conception of law is an abstraction.* (Maine). For (*a*) while considering law as it is, Austin lays undue stress upon the idea of force, abstracting or eliminating all the other ideas involved in it, and again (*b*) Austin does not take into consideration law as it has been in the past.

With regard to (*a*) it may be said, that although law depends upon the force of the state yet a definition of law, in order to be accurate and comprehensive, should include all

[3] But see Prof. Vinogradoff, Common Sense in Law, p. 37.

the ideas involved in the conception, [*viz.* (1) that it is a command (force), (2) that it is a unity, (3) that it is a growth and (4) that it is a growth directed by conscious foresight.[4]]

With regard to (*b*) Maine observes that Austin did not take into account the historical past of law as it is and his conception of law is difficult to be realised in socities of antiquity.

Answer to this criticism

But to this it may be *replied* that it was scientific accuracy and not all-comprehensiveness which was Austin's aim The law as he found it to be, was the subject-matter of his science It may be that the ape was the physiological predecessor of man, but a definition of man need not be so wide as to include a creature with a tail It is enough if we say that he is a rational animal So, likewise, in defining law, Austin took it as he found it to be, and did not think it worth his while to give a definition including its historical past. And it cannot be denied that his definition is applicable to law in a fully formed state.

(vii) Seventh criticism: (Maine). All laws do not proceed from sovereign.

(*vii*) *Many rules of conduct which are enforced like laws do not proceed from the sovereign.*[5] (Maine's criticism). Thus Maine says that Austin's view does not apply easily to

[4] That Law is an organism is suggested by Ihering.

See Korkunov, The Theory of Law (Translated by Hastings.) p. 52.

[5] This objection is different from objection (*i*), where the law is alleged to be not imperative in form, whereas, the present objection means that law does not proceed from the sovereign authority at all.

e.g. (a) Customs and (b) English common law.

customary law in general and English Common law in particular.

(a) Customs.

According to him the village customs of the Punjab were laws, because they were customs and not because they were commanded by Ranjit Singh, who never thought of the task of laying down law for his subjects, as his proper function.

Austin's reply to this.

To this Austin would *reply* that the customs are moral rules, so long as they are not acted upon by Judges, who have got a delegated authority from the sovereign to issue commands.

How Holland supports Austin.

Professor *Holland* sup rts Austin and in reply to Maine's criticism says that so far as the relation of an oriental tax-gathering state (*e.g.*, the Punjab under Ranjit Singh) to the village customs of its subjects is concerned, it may be said that disobedience to the village custom was either acquiesced in or forcibly repressed by the local authority. If it was acquiesced in, then the custom was no law at all. If it was repressed, then the local force repressing it was in the last resort, supported by the strength of the whole state. Thus the humblest custom may be regarded as a law enforced by the sovereign authority.

(b) Common law.

Again as regards Common Law, which consists of the decisions which the judges give according to their own view of what is right, it may be asked—how can they be described as commands? In Maine's opinion Austin's reply would be, 'that the sovereign commands what he permits.' Maine would impute this

Maine imputes to Austin the maxim, 'the sovereign

answer to Austin even in the case of customary law mentioned in the previous paragraph.

commands what he permits.'

Sir William Markby points out that Maine does not correctly represent Austin in imputing to him the maxim, 'what the sovereign permits he commands.' According to him what Austin does say is that whatever is permitted to a Judge to order, and is enforced by the sovereign authority when it is ordered, is commanded by the sovereign.

Markby shows that Austin's meaning is different.

But even if Maine's criticism be modified as suggested by Markby, the difficulty as to judge-made law is not over For it is not true universally that any rule which the sovereign permits a judge to lay down, is commanded by the sovereign, because the judge may be expressly forbidden (as under the French Civil Code) to lay down such a rule at all.

But even accepting Markby's interpretation, the theory is not free from difficulty.

II. **The German Theory.** The Second Theory of the nature of law is that "the courts, in deciding cases, are, in truth, applying what has previously existed in the common consciousness of the people" Savingny is the ablest expounder of this theory "The foundation of the Law" says he "has its existence, its reality in the common consciousness of the people. This existence is invisible. How can we become acquainted with it? We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners and custom. Thus custom is the sign of positive law, not its foundation."

II. The German theory: Law exists in the common consciousness.

Savigny.

The theory criticised.

The German Theory Criticised. Savigny is confronted by a difficulty of the same kind as stood in the way of Austin. The great bulk of law is unknown to the people. How can it be regarded as the product of their consciousness?

Savigny's reply.

Savigny's reply. Savigny meets this difficulty by saying that the bulk of law was originally known to the collected people, but owing to the developments of society, its details can no longer be mastered by the people in general. Thus a separate class of legal experts has grown and law which formerly existed in the common consciousness of the people in general, continues now to live in the special consciousness of this class.

A rejoinder to Savigny.

But it may be mentioned as a *rejoinder* to Savigny, that the jurists in whose consciousness law is said to exist, do not necessarily set forth the opinions of the people Thus when two jurists give different opinions on a particular question, do they both declare the opinions of the people? If they do not, then which of them is correct and on what principle?

Why then Jurists differ?

III. The third theory: Courts are the discoverers of law.

III. The Third Theory of the nature of law is that the judges are the discoverers, though not the creators, of law. "The law, indeed is identical with the rules laid down by the judges, because they are law, and they are not law because they are laid down by the judges."

The theory criticised. The theory is open to the objection that is is absurd to suppose that a law which is now laid down by the courts has

been existing from remote times, when the condition of the society did not demand such a law. Thus in India, those who believe that idolatry is of later growth, may ask—what was the law as to the gift of property to a non-existent idol at the time of Maharaja Harischandra? To answer, that although the law was then not discovered, it existed and was what is now declared to be so, is absurd, because the society had then no occasion for it. The situation becomes more difficult when we remember that the decisions of the court often change. Thus, for instance, before the decision of the Full Bench of the Calcutta High Court, it was often ruled[6] that a gift to a non-existent idol is invalid. According to the theory under criticism, this was the pre-existent law that was discovered. But what becomes of it when the Full Bench decides[7] otherwise; it cannot be said that the former judges made a wrong discovery. For discovery could not be made of a thing, which had no existence.

Its criticism.

IV. The Fourth Theory: The last theory of law is that it is composed of the rules which the courts, that is the judicial organs of the state, lay down for the determination of legal rights and duties.[8] This is Professor Gray's view and he says that the "difference in this matter between contending schools of Jurisprudence

IV. The fourth theory: law is what the courts lay down.

[6] I. L. R. 25 Cal. p. 404. [7] 10 C. L. J. p. 335.

[8] Salmond says "The law consists of the rules recognised and acted on in Courts of Justice." It is submitted that this is rather a description of law.

arises largely from not distinguishing between the law and the sources of law."

Conclusion. We have now stated the different theories that are current about the nature of law. It has already been observed that the analytical method of enquiry is followed in this treatise and that we have adopted Professor Holland's definition of law as a general rule of external human action enforced by a sovereign political authority. As an explanation of the reason for our doing so, it may be mentioned that inspite of the the numerous criticisms, the Austinian theory of law (of which Holland's theory is a modification) is not positively erroneous but is only inadequate. Nevertheless owing to its sufficiency so far as present law is concerned, it is now well established, at least in England, as the true conception of law.

Why the Austinian theory is generally followed.

CHAPTER IV

Sovereignty.

Positive Law has been defined as a general rule of external human action enforced by a sovereign political authority. But what is a sovereign political authority? In other words where does supreme mastery or sovereignty reside?

*De Jure and De Fact sovereignty:[1] The term sovereignty is used in two senses—legal (De Jure) supremacy and practical (De Facto) mastery.

Difference between legal sovereignty and practical sovereignty.

Legal sovereignty differs from Practical sovereignty. (*a*) Legal sovereignty exists in the sphere of law. It belongs to him who can demand obedience as of right. Practical sovereignty exists in the sphere of fact. It is the power which receives and can by the strong arm enforce obedience (*b*) Legal sovereign of a state is ascertained by determining the person (or body) to whom the law assigns in the last resort the right of issuing general rules or special orders or of doing acts without incurring liability therefor. Practical sovereign is ascertained by determining the person (or body) whose will in the last resort prevails or is likely to prevail. (*c*) Legal sovereignty is divisible but practical sovereignty is indivisible. (*d*) Legal sovereignty is formal and not material, that is,

[1] See Bryce—Essays in History and Politics.

it does not depend on the obedience actually renderd, for the law assumes obedience to be always enforceable. (c) Legal sovereignty may be limited but practical sovereignty is by its definition incapable of being limited by law though its possessor may be restrained by the fear of consequences.

Sovereignty defined.

Sovereign: We are here concerned with only the legal aspect of sovereignty. Legal sovereign implies that there are two essential parts of a state, *viz.*, the sovereign and the subject. The former constitutes that person or those persons in whom the aggregate of political powers (called sovereignty) resides.

Austinian conception of sovereignty.

Austinian theory of sovereignty.[2] According to Austin, sovereignty always implies an independent political society. In his opinion, there can be no sovereign, and consequently no such society, unless (*a*) the bulk of the given society habitually obeys a determinate superior; and (*b*) that superior does not habitually obey any other determinate human superior.

State defined.

State. This definition of sovereignty involves the conception of state. What is a state? "A state" says Professor Holland, "is a numerous

2 In advocating this theory of sovereignty Austin follows Bentham who may be said to have revived the doctrine of sovereignty. There is this difference that whereas Hobbes talks of sovereignty as an ideal conception or a dogma pointing a way out of civil war, Bentham takes it up as embodying the characteristic features of a normal state. Hobbes bases sovereignty on a covenant of each member of the community with every other member to surrender all their civil rights

assemblage of human beings generally occupying a certain territory, amongst whom the will of the majority, or of an ascertainable class of persons is, by the strength of such a majority, or class, made to prevail against any of their number who oppose it."[3]

The definition analysed. There are therefore three elements in the conception of the state: (1) there must be a numerous assembly of human beings; (2) the assemblage must occupy a certain territory; (3) the assemblage must have a political organization in it, *i.e.*, its sovereign part must be differentiated from its subject part. The definition of state analysed.

PEOPLE. The assemblage of human beings is technically called a people. 'A people,' says Professor Holland, 'is a large number of human beings, united together by a common language and by similar customs and opinions, resulting usually from common ancestry, religion and historical circumstances.' People defined.

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and power into the hands of one person (or body) who thereby becomes sovereign, but as against whom, seeing that he is himself not a party to the contract, it cannot be annulled by those who made it, because they made it not with him, but with one another. (Bryce). According to Bodin sovereignty is the highest power in a state, which is subject to no laws but is itself the maker and master of them. It is subject only to the law of god and the law of nations.

[3] The term state is used to denote either (*a*) a political society dependent or independent, (*b*) or an independent political society, or (*c*) the government of a political society, or (*d*) the territory of a political society. Salmond. Various meanings of state.

Difference between state and people. (a) State: a political unit. (b) State has territory. (c) State has political organization. (d) People not necessarily co-extensive with the state. (e) State cannot exist without a people.

Difference between people and state. (*a*) A people is a natural unit, whereas the state is a political unit. (*b*) The state has generally got a territory, the people need have none. (*c*) The state must have a political organization, *i.e.*, a machinery for enforcing the opinion of the government on the governed, but the people has no such organization. (*d*) A people may not be co-extensive with a state. Thus one people may form one state (*e.g.*, the French) or a state may be formed of more people than one (*e.g.*, Austria Hungary), or one people may enter into the composition of several states (*e.g.*, the Poles). (*e*) A state cannot exist without a people but not *vice-versa*.[4].

The three theories of the origin of states.

The Origin of States. The definition of state has already been given. The conception will be more clear if we consider the various theories about its origin: Principally there have been three such theories: (i) the Greek theory, (ii) the Social Contract theory and (iii) the Historical theory. A brief consideration of each of them will not be out of place.

(i) The Greek theory of Divine origin.

(i) THE GREEK THEORY. According to the Greek theory the state is of divine origin; its

Holland shows that Savigny was wrong in thinking that people could not exist unless in state.

[4] Savigny's opinion that a people can never exist without its bodily form, the state, and that the production of the state is the highest stage in the procreation of law, is questioned by Professor Holland. With regard to the former he shows that the Arcadians (mentioned by Aristotle) remained as people before they were formed into a state. With regard to the latter he says 'Morality may precede, but Law must follow, the organization of a political society.'

organization rests on the will of God. "Every law" says Demosthenes, "is a gift of God, and a decision of sages."[5]

(ii) THE SOCIAL CONTRCT THEORY. Not being satisfied with the superstitious idea of the divine origin of states, later philosophers have invented the theory that society is founded on contract. Hobbes, Locke and Rousseau have been the chief exponents of this theory. Each of them gives his own account of it, but they all trace the origin of society to some sort of contract.. This theory has met with vehement criticisms from renowned writers.

(ii) The social contract theory.

The theory criticised. Thus Austin, the most laborious critic of this theory argues (*a*) that the theory is needless, for the hypothesis of an original covenant is not necessary for a satisfactory explanation of the origin of society (*vide* the third theory) and that it is inappropriate because an agreement presupposes the existence of an authority to enforce the agreement; (*b*) that agreement is not the only source of obligation and (*c*) that the theory is a fiction as there is no historical evidence of the existence of any such contract Sir Henry Maine also observes that the theory omits to consider that in primitive times, the idea of contract was not known. (*d*) It may also be pointed out that the theory neglects the fact that in early times the unit was not the individual but the family.

The theory criticised by Austin: (a) needless and inappropriate. (b) Agreement is not the only source of obligation. (c) It is a fiction. Maine. (d) The family and not the individual was the ancient social unit.

[5] Of course everything may be said to be due to God's will but it is not in this sense that 'state' is said to rest on the will of God.

(iii) The third theory: The Historical theory. (Maine).

(iii) THE HISTORICAL THEORY. The historical theory of the origin of states so ably propounded by Sir Henry Maine, is that the state grew out of the family. The ties of kinship gave rise to the family, the development of which broght on its disintegration; the idea of the paterfamilias was then realised in the sovereign, who had the control over the subjects, just as the paterfamilias dominated over his dependants.

B. L. '09 (a)' 12 (a) The two aspects of sovereignty:

The Two Aspects of Sovereignty. We have said above that the state has two parts, *viz.*, the sovereign and the subject. Now sovereignty has two aspects (*a*) external and (*b*) internal.[6] The external aspect of sovereignty consists in its possessor (the sovereign) being independent of all external control, in its internal aspect, soereignty is uncontrollable in its actions within the state.

External and internal.

The two marks of sovereignty according to Austin: (a) Positive.

Its example.

(b) Negative.

Its example.

[6] The Internal and External aspects of sovereignty are mentioned by Austin as its *positive* and *negative* marks respectively. According to him, in order that the given society may be an independent political society, (*a*) the bulk of the given society must habitually obey a determinate superior, (positive mark); (Thus for example, when the allied armies occupied France in 1815, the occasional commands of the allied sovereigns were obeyed by the French Government and therefore by the French people; these compliances did not amount to a habit of obedience, therefore the allied sovereigns were not sovereign in France, and the French Government and its subjects, were accordingly an independent political society.) and (*b*) such superior should not habitually obey any other determinate human superior (negative mark). Thus, for example, a Viceroy, who habitually obeys the author of his delegated powers, con-

External sovereignty considered.

External Sovereignty. All states possess internal sovereignty, but external sovereignty is possessed only by the independent states. All kinds of states do not possess external sovereignty equally obviously.

Holland's classification of states. *B. L. '09 (a)*

States classified. States, according to Professor Holland, are either (*a*) simple or (*b*) compound. A simple state is a state which is not[7] bound in a permanent manner to any foreign political body, e.g., Afghanistan. States which are not simple and which are, therefore, called compound states may unite in equal or unequal terms. Examples of states uniting in equal terms are the U. S. of America and the Swiss Confederation. Examples of states uniting on unequal terms are the British and the Turkish empires

External sovereignty in simple states.

We have already observed that the mark of external sovereignty is not possessed by all states equally obviously Now in simple states the external mark is easily recognised; but not

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stitutes, with the people who habitually obey him a society political but Subordinate

Salmond's classification (i) Internationally: (a) Independent. (b) Dependent. (ii) Constitutionally: (a) Unitary or (b) Composite which is (1) Imperial or (2) Federal.

[7] *Salmond's classification* Salmond classifies states in two different ways, (i) Internationally as (*a*) Independent, where the state is complete in itself *e.g.*, the British Empire, and (*b*) Dependent, where it is part of a larger whole *e.g.*, the Dominion of Canada; (*ii*) Constitutionally as (*a*) unitary, where the state is not made up of other states, (*b*) composite, where it is. A Composite state may be (1) Imperial where the government of one of the parts is also government of the whole—*e.g.*, *the British Empire*; (2) Federal, where there is a central government in which all the constituent states share *e.g.*, United States.

The same in compound states.

so in compound states. When the component states forming a union are joined equally, the external sovereignty resides in the government that results from the union; when the states are united on unequal terms, the external sovereignty resides in the suzerain state.

Internal sovereignty considered.

Internal Sovereignty. The question, as to in whom the internal sovereignty resides, is often debated. Internal sovereignty may sometimes vest in all members of the state possessing defined qualifications. The state is then a Democracy. Or it may be possessed by some one individual or a number of individuals. In the former case the state is a Monarchy, in the latter, it is an Aristocracy

The theory of sovereignty as given above which is associated with the name of John Austin has not gone without critics.

The Austinian theory criticised. *B. L. '12 (a)'.*

Criticism on the Austinian theory of sovereignty. The theory of sovereignty is closely connected with the theory of law and therefore all the criticisms which have been put forward against the Austinian theory of Positive Law, (for these see Ch. III) apply to the conception of sovereignty. We need only reiterate here the most important criticisms, *viz.*, those of Sir Henry Sumner Maine.

By Maine.

Maine's Criticism. Maine says that Law does not necessarily imply sovereignty, for in some societies Law is scarcely what the

sovereign commands, *e.g.*, in the Punjab under Ranjeet Singh.[8] (See Ch. III, P. 35.)

Holland. In the opinion of Professor Holland, the truth contained in Maine's opinion is that it is no doubt a mistake to suppose that the obligation of law rests everywhere and at all times as immediately and obviously upon a sovereign authority, as it does in England at the present day.

Holland supports Austin.

But he tries to justify Austin. In the western states, both past and present, says he, law obviously conforms to Austin's definition. For his answer so far as the Eastern States are concerned, see Ch. III., p. 35.

[8] Austin's theory of sovereignty is also criticised, because he regarded sovereignty as indivisible (but Markby shows that Austin did not regard sovereignty as indivisible), and illimitable. Sovereignty is not indivisible. As Salmond ponts out, the English sovereignty is divided between the legislature, executive and the judicature. Sovereignty is also not illimitable—it being limited both in fact and in law. It is limited in fact because of (*a*) International relations, (*e.g.*) the sovereign of a state recognising slavery can not authorise his subjects to own slaves in the British isles); (*b*) physical impossibilities (*e.g.*, the Parliament cannot make a man woman); (*c*) fear of revolution and (*d*) humanitarian feelings (*e.g.*, the Parliament may theoretically possess the power to put all blue-eyed babies to death, but it will not do so unless insane). It is also sometimes limited in law as for instance when Article V of the United States Constitution provided that certain parts of the constitution will be unalterable till 1808.

CHAPTER V.

The Sources of Law.

Four senses of "sources" *B L* '10 (*b*),' '12 (*b*)', '14 (*a*) & (*b*)'

Meaning of 'Sources of Law.' The expression 'Sources of Law' has been used in four different senses

(1) The Literary

(1) First, it may mean the *quarter* from which we obtain our knowledge of law, *e.g.*, statute-books, reports etc This is called the Literary[1] source of law

(2) The formal

(2) Secondly, it may mean the *ultimate authority* from which the law derives its force and validity This is called the Formal source of law The only formal source of law is the state

(3) The instrumental source
(a) Legislation
(b) Adjudication
(c) Equity

(3) In the third place 'source' may mean the *instruments or the organs* of the state by which legal rules are created or recognised These are called the instrumental sources of law. They are Legislation, Adjudication and Equity.

(4) Material source
(a) Religion
(b) Scientific discussion
(c) Usage

(4) Lastly, the expression may denote the *causes* to which the origin of rules which are recognised as law, is due They are called the Material sourses of law They are Religion, Scientific discussion and Usage

The expression 'sources of law' is not frequently used in England in the first of the

[1] This is rather a continental than an English use of the term 'source'—Salmond.

above senses. In the second sense it can only mean the state. Let us consider the last two senses in detail.

I. INSTRUMENTAL SOURCES.

(1) First instrumental source: legislation. *B. L.* '12 (*b*)'

(i) Legislation.

Of the three agencies through the instrumentality of which new rules acquire legal character, Legislation is the most direct and with the advance of civilization has the tendency to exclude the other two.

What is Legislation?

What is Legislation? It is that source of law which consists in the declaration of legal rules by competent authority.[2] This authority may be either the supreme legislature or some subordinate authority, having a delegated power to legislate. Such subordinate authority may be either (*a*) a subordinate legislature (*e.g.*, the Legislative Council of the Governor-General of India which is subordinate to the British Parliament), or (*b*) a corporate body (*e.g.*, a Railway Company which issues its by-laws), or (*c*) Courts of Justice in so far as they have got power to make rules regulating their own procedure, (*e.g.*, the High Court of Calcutta, making rules through the Rule Committee,

Declaration of rules by: (1) Supreme Legislature, (2) Subordinate authority which may be (a) Subordinate Legislature, (b) A corporation, (c) Courts making rules of procedure.

[2] The expression 'legislation' is used in two other senses; *viz.*, (1) all forms of law-making, (including adjudication) and (2) every expression of the will of the legislature whether directed to the making of law or not. In sense, (1) legislation is either *direct* or *indirect*. Legislation proper is direct legislation. Judge-made law is due to indirect legislation.

Other meanings of 'Legislation.' (1) All law making. (2) All expressions of the Legislature's will.

according to the provisions of the new Civil Procedure Code)[3].

The rules made by subordinate authorities, may be declared invalid by courts.

These subordinate authorities derive their power from the supreme legislature and laws promulgated by them are valid, if they are not *ultra vires*, *i.e.*, made in excess of the delegated powers. Their validity is determined by the Judicature. If the state has got a written constitution defining the limits of the powers of the Supreme Legislature, the acts of the latter body can be questioned by the judicature, if the same happen to be contrary to the constitution. Thus in the United States of America, the Supreme Court can pronounce an Act passed by the Congress as illegal.

So also the rules made by supreme Legislature if the same are contrary to written constitution.

Written and unwritten Law. Law that has its source in legislation has been called written law, all the other forms being distinguished as unwritten.[4] In written law the sovereign power

[3] This power of the Judicature is truly legislative and judicial. The judicature as such makes new laws by way of creating precedents.

[4] Mr. Salmond suggests the terms 'enacted' and 'unenacted' as better substitutes of 'written and 'unwritten.' The above according to Austin, is the *juridical* sense of the terms, 'written' and 'unwritten.' It originated with the Civilians or commentators on Roman Law. The Roman Lawyers used them in a *grammatical* meaning. According to them 'written Law' was that which was committed to writing at the outset; 'unwritten Law' was law not so committed to writing. Blackstone and Hale seem to take an intermediate position. Written laws, according to them, are acts of the supreme legislature; unwritten laws are all other laws, provided they were not set down in writing at their origin.

gives not only the force but also the contents of law. In unwritten law only the force is so given.

(ii) Adjudication.

(ii) Second instrumental source,—'adjudication.'

The second organ through which the State makes laws is adjudication or the decisions of the Law Courts.

Two theories of judge-made law.

Two Theories of Judge-made Law. With regard to the nature of adjudication as a source of law, there are two theories: (1) one is that the judges do not make new law but administer and expound the old law. This is Blackstone's view. The other theory is (2) that the judges not only apply the existing law to facts, but also make new laws for cases not provided for by the existing laws and modify the latter so as to suit newer developments of society. This is Austin's view and is accepted by Professor Holland and other modern thinkers. The judges however do not expressly exercise the power of making new laws but they do so under the garb of exercising their ordinary function, *viz.*, explaining existing law and applying it to facts of cases and deciding upon the existence of authoritative customs.

(1) Blackstone. Judges do not make new law.

(2) Austin and Holland's view Judges make new law.

How do judges make new law?

The force of judge-made law.

The force of precedents.[5] In England and America a judicial precedent speaks with authority. It is a source of law and not merely

(1) In England

[5] Precedents may be divided into two classes.—(a) *Authoritative* and (*b*) *Pursuasive*. Authoritative precedents, again, are of two kinds: (1) Absolute, *i.e.*, binding whether right or wrong, and (2) conditional, where the decisions may be disregarded under

Precedents classified.

and America. Precedents are binding.

an evidence of it. In England although the force of precedents has been recognised since the time of Edward I, they had at first no such binding authority as they now possess. Thus Lord Hales said that decided cases were less than law. But a change took place later on. Thus Blackstone recognses that judges are to abide by former decisions. This principle is now well established in England.

History of English Precedents.

What is Ratio Decidendi? It is the principle on which the concrete case is decided.

It may be mentioned here, that what is important in a precedent is not the actual decision, but the principle on which it is grounded or, as it is technically called, the *ratio decidendi* This may either be explicitly stated by the court, or may have to be discovered by an examination of the judgment.

(2) On the European continent precedents

Continental view[6] On the continent of Europe, however, decisions of courts have, apart from their intrinsic merit, no binding force

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certain circumstances Thus decisions of the Court of Appeal are of conditional authority with the House of Lords. In England absolute authority exists in three cases (i) every court is absolutely bound by the decisions of all courts superior to itself (ii) The House of Lords but not the Privy Council is absolutely bound by its own decisions (iii) The Court of Appeal is absolutely bound by its own decisions and those of older courts of co-ordinate authority, *e g*. the Court of Exchequer Chamber —Salmond. See also Pollock's First Principles of Jurisprudence.

In England absolute authority exists in three cases.

[6] The peculiarity of English Law in this respect has been attributed to the powerful and authoritative position occupied by the English judges at all times. The continental systems are founded on the Roman system, where the Bar gave law to the Bench. But in England the Bench gave law to the Bar.

English view due to unique position of the judges.

on a tribunal. They are not binding precedents even on inferior courts. Precedents were similarly regarded under the Roman Law.

are not binding. (3) So also in Rome.

But of late the importance of reported decisions has been increasing on the continent, and in England and America precedents are being subjected to more and more criticisms.

Recent approximation of the two views.

A difference of opinion exists as to the significance of a decision overruling a previous one. According to one view, the previous decision was good law until it was reversed. According to another view, the subsequent decision is a legal adjudication that the prior one was not law at the time it was made. The latter now seems to be the accepted view.[7]

The significance of the overruling of a precedent. Two views. The better view.

(iii) Equity.

(iii) The third instrumental source.

The last of the instrumental sources of law is Equity.

Meaning of Equity. Equity is a term which has several meanings,[8] but in that particular sense, in which it signifies one of the agencies in developing law, it denotes a body of rules existing by the side of the original Civil Law,

'Equity.' Its meaning as source of law. *B. L. 11.* (a)

[7] The overruling of a precedent is not the abolition of an established rule of law, it is an authoritative denial that the supposed rule of law has ever existed—Salmond.

Salmond's view.

[8] Mr. Salmond mentions three (1) First, it means 'natural justice'—equality. This is the popular application of the term. (2) In the second and legal sense, 'equity' means 'natural justice' but in a special aspect, *i.e.*, opposed to the rigour of inflexible rules of law. (3) In the third place, 'Equity' signifies a particular kind of law. This sense is peculiar to English nomenclature.

Different meanings of Equity.

founded on distinct principles, and claiming incidentally to supercede the Civil Law in virtue of a superior sanctity inherent in those principles. (Maine).

It arises from the exercise of the discretion of judges or arbitrators in applying general considerations of justice and fairness to the decision of legal conflicts.

Let us explain the meaning further. Suppose an infant state has got a body of rules as laws. If the tendency of the state is conservative, this body of rules will soon become stereotyped. Innovations will, therefore, be resented. But, if the society be a progressive one, the needs of the people will outgrow the provisions of the existing law. Legal developments will become absolutely necessary in order to harmonise the existing system with the advancing civilization. To redress the grievances of the people, consequent upon the rigidity and inadequacy of law, high officials of the state have, in such cases, been sometimes specially empowered to introduce new rules founded upon principles of morality or natural justice, which are applicable to legal questions and which commend themselves to the state-official in question. The body of the rules introduced stand side by side with the old system, claiming, in cases of conflict, to supersede the same (but not purporting to repeal it), by virtue of a superior sanctity inherent in them.

Vinogradoff.

Two instances of Equity. (1) Edict of the Roman Praetor.

History furnishes two great instances where rules introduced in this way had important effects: They are the Edict of the Praetor at Rome and Equity of the Chancellor in England.

The earlier as well as the later history of both these systems are somewhat similar. (2) Equity of the English chancellor.

History of Roman Equity. The Prætor at Rome was a high official who by virtue of his office used to exert an influence over all judicial processes. Now the Civil Law of Rome applied only to Roman citizens and was not applicable to foreigners, swarms of whom settled in Rome's territory, as she grew in conquest and commerce. Having no remedy at Civil Law, these foreigners sought relief from the Prætor who decided cases in which they were concerned [9] History of the Edict of the Prætor.

An illustration will explain. Under the Civil Law, (Quiritarian) ownership was not allowed to foreigners. To remove the hardship so caused, the Prætor introduced a system of

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[9] But if the civil law was not applicable, what was the law that the Praetor applied to these cases? Sir Henry S Maine thought that this law was composed of the customs, which the Romans observed to be common to all or most of the tribes with which they came into contact In the opinion of Sir F. Pollock this law consisted of the customs which the Praetor found to be prevalent amongst the foreign merchants and which he therefore adopted The rules embodied in the Praetorian Edict came, in the time of Cicero, to be known as Jus Gentium After the introduction of Stoicism from Greece into Rome, the Jus Gentium came to be identified with Jus Naturale and in this way --The Stoics believed that there existed an ideal code of law called the law of Nature or Jus Naturale. Under the influence of Stoicism, the Romans came to think that their Jus Gentium was the lost ideal code of Jus Naturale See Maine's Ancient Law Chap. III and IV. See also appendix A.

possession protected by interdicts and fictitious actions, which had all the advantages of ownership.

Each prætor on assuming office issued an Edict or proclamation, notifying the modes in which he intended to grant relief against the rigidity of the Civil Law. But did each Prætor invent a new body of rules? No, each of these Prætors virtually accepted his predecessor's Edict subject to certain additions and modifications. Thus the proclamations of the long line of Prætors constituted a system known as Jus Honorarium or Jus Prætorium.

The Prætorian Edicts: a system.

The Jus Prætorium was introduced into the general body of law by the imperial legislation of Justinian. Thenceforth the Prætorian Edict ceased to be a living source of law.

The later history of Roman Equity.

History of English Equity: The Common Law in England early became a rigid system. Owing to this as well as other causes, remedy at Common Law was often unobtainable. The practice in such cases was to petition the king who, by the virtue of his high prerogative, granted relief in these matters which were called matters of cosncience. Such petitions were, by the King, referred to his Chancellor in his capacity as 'Keeper of the King's Conscience.' As the cases so referred increased in number, a body of Chancery precedents[10] grew up. They were known as Equity.

History of English Equity. *B.L.* '11 (*a*).

Relief was not often obtainable at Common Law.

The sufferers petitioned the king.

These matters were referred to the Chancellors whose rules were Equity.

10 At first the rules of Equity were very elastic, so much so that Lord Selden calls it "a rougish

The subsequent history of English Equity is similar to that of Prætorian Equity. By the Judicature Act of 1873, the doctrines of the chancery courts were incorporated into the general body of the law of England. From that time, Equity as an independent system ceased to be a living source of law in England.

Later history of English Equity

Roman and English Equity compared. Comparing the Roman with the English system of Equity, we find that they resembled each other in that (1) they were both results of attempts to correct or supply the deficiencies of an existing legal system which though appearing to continue was virtually superseded; (2) that they both were unsystematic in form, and were introduced by gradual innovations; (3) they both proceeded upon a fiction, in Rome the fiction of a state of Nature,[11] in England, the fiction of the King's Conscience; (4) and that they both tended to become stereotyped or inelastic. They differed from each other in (1) that the Prætorian Equity was statute law, whereas Chancellor's Equity was, for the

Roman and English Equity compared. *B. L. 11 (a)*

Similarities.

Differences.

thing," which varied as the Chancellor's foot, meaning thereby that if the rules depended upon the conscience of successive Chancellors, Equity would be too uncertain a thing. Later on, however, Equity became a body of rules scarcely more elastic than the common law. This result was brought about during the Lord Chancellorship of Lord Eldon, who insisted that the doctrines of Equity Court should be well settled and uniform. Gee v. Pritchard, 2 Swanst, 414.

Equity varies as the Chancellor's foot.

11 But see Bryce, Study in History and Jurisprudence; Essay on Law of Nature.

most part, judiciary law; (2) that the Prætorian Equity was administered by the ordinary civil tribunals, English Equity by an exceptional or extraordinary tribunal; (3) that the Prætorian Equity was largely concerned with testamentary and intestate succession, English Equity was mainly occupied with trusts and injunction; and (4) that whereas the Chancellor's rules were called Equity, the Jus Prætorium, which no doubt had its source in the *aequitas* of the Prætor, does not seem to have ever been itself called *æquitas*.

II. MATERIAL SOURCES.

(i) Religion.

(i) The first material source is religion. *B. L. 12 (b).* It is a source: (1) of Hindu Law. (2) of Moslem Law. (3) of English Law. (4) of Greek Law. (5) of Roman Law. (6) of Continental Law.

Let us now turn to the material sources of Law. The first is Religion. The materials of law, that is to say, the rules which are declared as law by the law-making organs of the state and to which legal force is given by the formal source, *viz.*, the state, are sometimes taken from religious precepts. Thus in the East, the Sruti is regarded by the Hindus as a source of their law, while the Koran is similarly respected by the Mahomedans. In the West also religion is recognised as a source of law; but its importance there is less than in the East. Christianity is sometimes spoken of as a part of the law of England.[12] The Greeks regarded law as a discovery and gift of God. The priestly colleges had considerable influence upon the

[12] Cowan *v.* Milbourne, L. R. 2 Ex. 230.

Roman Law and the Canonical Laws have affected the modern continental systems.

(ii) Scientific Discussion.

(ii) The second material source is scientific discussion.

Rules of law are often derived from the Jurisprudential writings of great thinkers. Their opinions on matters for which the existing law made no provision, or on which the existing law was defective, were sometimes adopted as laws.

Instances.

Examples of such opinions were the *responsa prudentium* (before they were clothed with an official character) in Roman Law, the writings of great lawyers like Coke, Hale, Blackstone in English Law, treatises like the Mitakshara, the Dayabhaga and the compilations like the Hedaya and the Fatwa-Alamgiri in Mahomedan Law. It may be observed in passing that the 'obiter dicta'[13] of the English judges are only material sources of law

(iii) Usage.

(iii) The third material source is usage. What is usage. *B. L. 13 (b), 16 (a).*

Usage or custom is the most important material source of law. Usage says Professor Holland is "the spontaneous evolution by the popular minds of rules, the existence and general acceptance of which is proved by their customary observance."[14] It is a long and generally observed course of conduct. There is much

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[13] By 'Obiter Dicta' we mean "Such statements of law made by the judges as are not necessarily called for by the case before them." Obiter-dicta. *B. L. 13 (b), 16 (a).*

[14] "Custom as a source of law," says Professor Vinogradoff, "Comprises rules which arise from popular opinion and are sanctioned by long usage." Vinogradoff's view.

Two important questions. B. L. 25 (*b*).

difference of opinion on two questions in connection with usage. They are, first, mode of its growth as usage and secondly the mode of its transformation into law.

1. Growth of usage. Holland's view of the growth of a custom.

I. **The growth of Usage.** According to Professor Holland, custom is formed in the following way ;[15] Suppose a man has to effect a purpose of his own. If the purpose is a new one, he must find out for himself a way to do it. Several alternative courses of action are open to him. He adopts one of them at random or deliberatey chooses it owing to religious scruples or on grounds of expediency. Others who follow him repeat the same course of action similarly. Thus a habit is formed. This habit of acting in a particular way is a custom. The older a custom grows, the stronger does its force become.

An analogy; the formation of a path across a common.

This account of the growth of a usage has its parallel in the formation of a path across a common. One person passes through it along a particular line which he adopts at random or

He further points out that custom may mean a great deal besides this; for instance it may denote the usual behaviour of men in certain circumstances. Thus in the enquiry into the Titanic disaster attempts were made to ascertain whether or not it was customary for captains of ships to reduce speed when near icebergs.

15 The growth of usage is like the growth of an organic whole. We perceive that a child is growing from month to month, but we cannot at any moment fix upon the extent of its growth. So likewise, the growth of a usage is imperceptible at any particular moment.

deliberately chooses. Others follow him, sometimes, out of their free choice, but oftener, because they had before them a track already formed. Thus a path is made.

How does custom become Law? When a usage has been formed, but the state has not come into existence, its binding force is the same as that of morality. The custom is followed because it has been generally observed and because its observance is thus believed to be salutary. Popular opinion also supports such observance.

The growth of the legal force of the custom. *B. L. 15 (b).*

Before the state is formed.

After the state is formed some of the customs are enforced by the state They become customary law

After the state is formed

Customary law is known in every country It existed at Rome as the *Jus moribus constitutum* and in England as the Common Law. Customs are given effect to by the law-courts, if they are of a certain description [16]

The View of the Historical School The above mentioned account of the growth of usage and of its force (given by Austin and Holland) does not find favour with the jurists of the Historical school led by Savigny and Puchta. According to them, the growth of

View of the Historical School.

[16] The tests of the validity of a custom are (1) The custom must be accompanied by the conviction on the part of those who use a custom, that it is obligatory and not merely optional, (2) it must be consistent with statute law; (3) if it is a particular custom it must have existed from time immemorial; (4) and it must be consistent with common law —Salmond.

The tests of the validity of a legal custom

Custom is a manifestation of Law which is begotten in popular consciousness.

custom does not depend upon individual arbitrary will or accident. Customs are the shadow of something which exists. They are evidence of law which is begotten in the people by the popular intelligence (Volksgeist).

State recognition is not necessary to give legal character to custom

As regards the force of custom, these jurists say that a custom has the force of law simply because it is a custom. To acquire legal character, a custom does not wait for state recognition.

Austin's reply to the Historical School.

Austin's reply to the Historical School.

This view of the Historical jurists is criticised by Austin. He says that (1) if their hypothesis be accepted, then all customs would be legally binding, whereas many are not—*e.g.*, that of wearing black at a funeral; (2) that if the custom is made legally binding by the people they alone can repeal it, why then customs are often abolished by Acts of Parliament; and that (3) if a custom is law even without state recognition there is no use of the courts declaring it to be law.

Holland's reply to the Historical School.

Holland's reply to the Historical School.

Professor Holland admits that the element of truth contained in the so-called Historical School of Germany is that the adoption of customary rules of conduct is unconscious. According to this view, as he understands it, the principle of law is anterior to its applications, custom being one of them. But his reply to this is that the principle is not anterior to the applications, but only a generalization of the same.

11. When does a custom become Law? Austin says[17] that a custom becomes law by being recognised by the state. So far Professor Holland agrees with Austin.

11. When does a custom become law?

B. L. 09 (b) 10 (a) & (b). 12 (a), 13 (b). 15 (a) & (b) 16 (a).

But there is difference between them so far as the answer to the question, from what moment does a custom take effect as law, is concerned. Austin says that a custom takes effect as law from the moment it is recognised by the state. But according to Holland, custom becomes law not from the moment when it is recognised by the state, but retrospectively. It was law as soon as it satisfied certain tests. As Mr. Salmond says, custom is law not because it has been recognised by the courts, but because it will be so recognised, in accordance with fixed rules of law, if occasion arises.

Three views. (1) Austin; Custom is law from the moment of state recognition. (2) Holland. It is law retrospectively.

The View of the Historical School. The foregoing view of the time from which a custom takes effect as law is not accepted by the jurists of the Historical school. They regard law as existing in the common consciousness of the people. Custom is a manifestation of such law. Therefore custom is already law and does not require state recognition to become so.

(3) The Historical school.

Austin and Professor Holland reject this view. For their reply *vide ante* Chapter III.

Austin and Holland's answer to Historical school.

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17 The recognition may be bestowed by the Legislature (as when an Act of Parliament adopts a custom) or by the Courts, as when a custom is embodied in a judicial decision.

How can state recognition be bestowed on a custom?

How far Holland's position sound ?

Holland's position examined. Differing from Austin, Professor Holland holds that although a custom is law by state recognition, it takes effect not from the moment of such recognition but retrospectively. But it may be asked, if custom was already law, why a recognition by the state is at all needed? To this Professor Holland's answer is that such recognition is necessary only to remove doubts as to the existence of a legal custom, just as doubts might have to be removed about the interpretation of an Act of Parliament.

CHAPTER VI

Legal Rights and Duties.

Ultimate object of Law. The ultimate object of law, says Professor Holland, is nothing less than the highest well being of society. Ultimate object of law.

This fact is not brought out clearly, if law is represented merely as a species of command, involving the ideas of obligation and penalty. The idea of coercion involved in law is, no doubt its most obvious characteristic. Hence some writers[1] give as much emphasis on it as if it were the only one. Law, they say, was added because of transgressions. It was brought into the world to limit men's natural liberty, so that they may not hurt each other. In short, according to them it preserves the freedom. which is allowed (by law) to the human will from interference. Well being of society. Negative conception of law.

But this is only a negative conception of law. "Law is something more than police." Besides coercion there are other characteristics involved in it. Thus law is also regarded as an organising unity. This is its positive con- B. L. 14 (*a*) 15 (*b*).

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[1] So Kant defines law as the totality of the conditions under which the free will of one man can be united with the free will of another, in accordance with a general law of freedom.

Savigny defines it as the rule which determines the invisible limit within which the existence and activity of each individual may obtain secure and free play.

Positive conception of law.

ception. Krause and Ahrens represent it as "harmonising the conditions under which the human race accomplishes its destiny, by realising the highest good of which it is capable."[2] To attain this highest good is the ultimate object of law.

Immediate objects of law are creation and protection of legal rights.

Immediate objects of Law. Jurisprudence, however, is not so much concerned with the ultimate objects of law as with the means by which these objects are sought to be attained. The means are the creation and protection of legal rights. The creation and protection of legal rights, therefore, are the immediate objects of law.

RIGHT

If law is concerned with legal rights, what is a legal right? The adjective 'legal' shows that other kinds of rights are also spoken of. So, first of all what is a right in general?

What is right? B. L. 09 (a). 13 (a).

Right: Might A right is to be distinguished from might A right, says Professor Holland, is one man's capacity of influencing the acts of another by means, not of his own strength, but of the opinion or the force of society. But if he has the capacity of in-

Right and Might.

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[2] HOLLAND.

Or as Locke says 'Law' in its true notion is not so much the limitation as the direction of a free and intelligent agent to his proper interest.....the end of law is not to abolish or restrain, but to preserve or enlarge freedom.

fluencing the acts of another by means of his own strength, he is said to have a *might*.

Legal and moral right. Now a right is moral, if it depends on the force of public opinion; it is legal, if it is supported by the state. As Professor Holland says, a legal right[3] is a capacity, residing in one man, of controlling, with the assent and assistance of the state, the actions of others

Legal and moral right. *B. L. 09 (a).*

Holland.

Improper uses of the term. The term right (like the term law, *see* page 21) has been ambiguously used Thus the substantive right, which signifies "capacity," is confounded with the adjective right which means 'rightful' Again the Latin, the German, the Italian and the French languages have got the same expression to denote law in the abstract, as well as right in the concrete

Improper uses of the term 'right' *B. L. 10 (b).*

The relation of law to rights. The relation of law to rights is that law defines the rights which it will aid or protect and also lays down the process by which it will aid or protect them. The branch of law which defines the rights, is called Adjective Law or Law of Procedure.

The relation of law to rights. *B. L. 10 (b)*

Law defines and protects rights.

[3] "A legal right,' says Professor Vinogradoff, "is the range of action assigned to a particular will within the social order established by law."

Vinogradoff.

Mr Salmond says "A right is an interest recognised and protected by a rule of right"

Salmond

According to Thering, rights are legally protected interests.

Thering.

Law is inadequately represented as a command.

Now this relation of law to rights is not adequately expressed by representing law as a command.[4] Professor Holland gives an idea of the true function of law, when he says that every law is a proposition announcing the will of the state and implying, if not expressing, that the state will give effect only to acts which are in accordance with its will so announced, while it will punish or at least visit with nullity, any acts of a contrary character. The state thus makes known what advantages it will protect, as being legal rights, what disadvantages it will enforce as being legal duties, and what methods it will pursue in so doing. Law and rights (therefore also duties) are thus inter-related.

What is sanction of law? B. L. 12 (*b*) 21 (*a*).

Sanction. "Law," says Professor Holland, "is in fact formulated and armed public opinion or the opinion of the ruling body;" for it announces that certain states of things and courses of action are viewed by it with favour, and that in case of the invasion of these states of things or in case of contrary courses of action being pursued, it will not only look on with disfavour, but will also, in certain cases, actively intervene to restore the disturbed balance. This intervention of the state is what he calls the 'sanction of law.' After the wrong is committed the state intervenes either to punish the wrong-doer or to prevent anticipated illegality or to effect restitution. But before the commission of the wrong, the sanc-

Intervention of the state. B. L. 21 (*a*).

[4] For an analysis of Command, see ante., p. 31.

tion takes the form of a threat by the state of a conditional evil.[5]

DUTY.

Duty defined.

Right implies active or passive furtherance of the wishes of the party having the right. Whenever any one is entitled to such furtherance on the part of others, such furtherance on their part is said to be their duty.

Moral and legal duty.

Moral and legal duty. Duties, like rights, may be moral or legal, when the duty is supported only by public opinion it is moral, when it is recognised by the state it is legal.

Are rights and duties correlated?

Correlation of rights and duties. Rights and duties are correlatives: when A has a right against B, B is under a duty to A. A's duty, therefore, implies a corresponding right.

Austin's absolute and relative duties.

Austin, however, is of a different opinion. According to him some duties do not correspond to rights.[6] He divides duties into absolute and relative. Absolute duties are those to which there are no corresponding rights; rela-

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Various meanings of 'sanction.'

5 Austin looks at sanction only as it stands before the wrong is committed. Austin mentions various meanings of the word 'sanction.' Some of them are as follow:—

(1) Austin's sense.—Sanction is a conditional evil annexed to a law to produce obedience to that law.

(2) Blackstone limits it to punishment under a criminal proceeding.

(3) The Roman lawyers applied it to the clause in a penal law declaring the punishment.

(4) It is also used as equivalent to 'confirmation by legal authority,' when we say that a bill is sanctioned by Parliament.

6 Markby follows Austin.

tive are those to which there are corresponding rights. Absolute duties, says he, are sanctioned criminally, that is to say, there being no corresponding rights, the violation of such duties results only in criminal prosecution. He classifies absolute duties as being (1) to oneself, *e.g.*, *not* to commit suicide, (2) to persons indefinitely, (3) to God or the lower animals, and (4) to the sovereign.

Absolute duties classified

Holland rejects the distinction.

But Austin's view is not now generally accepted Thus Professor Holland says, that not only a man has no relative duties to himself, to God or to the lower animals, but he has no legal duties towards them at all. These duties are at best moral or religious But he maintains that a man may have duties towards persons indefinitely or what amounts to the same thing, to the sovereign. The so-called duties to one's ownself, to God or to lower animals are reducible to duties to the sovereign. The duties to the sovereign, however, are not absolute but relative; that is to say, corresponding rights are possessed by the state.

The controversy, therefore, is reduced to the question · can the sovereign have[7] legal rights? Austin says 'no', Professor Holland

[7] According to Professor Gray, the idea that the sovereign can have no legal rights originated with Austin Austin's position is this To every legal right, which is a creation of positive law, there are three parties. (1) The sovereign, who sets the positive law, (2) the person on whom the legal right is conferred; and (3) the person on whom the

answers 'yes' and says "that this is so, may be seen from the form of indictment, which in England runs:—the king on the prosecution of A. B. against C. D." Austin himself admits, that all absolute duties are sanctioned criminally. The fact, that criminal prosecutions are conducted in the name of the sovereign shows that he has legal rights.

Can the sovereign have legal duties?

Can the sovereign have legal duties? The next question that arises is, can the sovereign be bound by a legal duty? Austin's reply is in the negative.

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duty is imposed. Thus that a sovereign should have a legal right, would require the existence of another sovereign to confer it. But there cannot be a sovereign over a sovereign in an independent state. Hence Austin concludes that the sovereign cannot have legal rights. Those who hold the contrary view (Holland, Salmond, Pollock, Brown, Gray, etc.) answer thus: It is not impossible that a sovereign should confer a right upon himself. When the sovereign declares that he will protect some interest of an individual, he creates a legal right in favour of that individual. So when he declares that he will protect an interest of his own, he creates a legal right in his own favour. There is however, this difference between a right residing in the sovereign and one residing in a private person, that, whereas a private person can only enjoy and exercise his right at the will of the sovereign, sovereign creates and enforces the right which he enjoys.

Austin's view explained.

See Jethro Brown, 'Austinian Theory of Law,' p. 193.

The proposition that all legal rights correspond to duties, is acceptable to Mr. Salmond, if by legal rights, only those that are strictly so, are meant. He classifies legal rights in general into (1) *legal rights strictly* so called, *i.e.*, to which there are

Legal rights.

His argument is—if the sovereign can be bound by a legal duty, some other sovereign must impose it; which is absurd (see foot note page 72). Hence he concludes that the sovereign cannot be bound by legal duties.

Austin says 'No.'

The state, no doubt allows itself to be sued by subject, *e.g.*, in England, by the "mendicant style of proceeding" known as the Petition of right, but it does so only as a matter of grace. Professor Holland, Sir F. Pollock and Professor Jethro Brown[8] hold the contrary view. If the sovereign allows himself to be sued by his

Legal liberties.

Legal powers.

corresponding duties, *e.g.*, the creditor's right to receive payment from the debtor; (2) *legal liberties*, *i.e.*, benefits derived from the absence of legal duties imposed upon a man, *e.g.*, liberty to express what opinions he pleases; and (3) *legal powers*, *i.e.*, abilities conferred by law on a man to determine the legal relations of himself or of other persons, *e.g.*, the power of a man to make a will. According to Mr. Salmond, no legal duties correspond to (2) and (3). For duty, says he, is an obligatory act. No positive acts are due by any body to persons having legal liberties and legal powers. But Professor *Holland* would answer otherwise. According to him, a duty is either an active or a passive furtherance by some body of the wishes of the party having the right. In this sense, there are duties corresponding to (2) and (3). Thus the duty corresponding to legal liberties is not to interfere with the exercise of legal liberties. Mr. Salmond, however, thinks that the duty of non-interference corresponds not to the legal liberties, but to another right, (*viz.*, that of safety from interference) which accompanies liberties. This accompanying or protecting right is often absent, *e.g.*, in the case of a license.

[8] Markby follows Austin.

subject, and get judgment against him and compensates the plaintiff, though all this subject to his consent, he cannot be said to be not bound by a duty.[9]

[9] According to Mr. Salmond the right of the subjects to sue the sovereign is an imperfect right, because, though judgment can be obtained against the sovereign, it can not be enforced.

CHAPTER VII.

The Analysis of a Right.

Right analysed *B. L. 09 (a) 11 (a), 12 (b), 16 (b).*

The elements of a right. The elements of a right considered as at rest, that is to say, considered apart from the circumstances of its origin, extinction, or transfer are called its *statical elements* They are :

Its statical elements

(1) Person of inherence *B. L. 13 (b).*

(1) A person in whom it is vested or who is the subject of a right. He is also called the person entitled or the person of inherence.

(2) Person of incidence

(2) A person against whom the right avails, *i e*, the person bound or the person who is subject of a duty, or the person of incidence.

(3) An act or forbearance.

(3) An act or forbearance, which the person entitled can demand from the person bound. This may be called the content of the right.

(4) An object

(4) In many cases[1] an object or thing over which the right is exercised.

Dynamic element

To these four elements of a right considered statically, a fifth, which comes in, when the right is considered dynamically, or in motion, is to be added. Rights are put in motion, *i.e.*,

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[1] This is according to Professor Holland, who holds that every right does not necessarily relate to a tangible object Salmond thinks that the object may be either a material or an immaterial thing; hence an object is an essential element of a right.

created, transferred or extinguished by acts (*e.g.*, a conveyance) or events (*e.g.*, the death of a father). Acts and events may be included in the term facts. A fact, therefore is the fifth element of the right. The fact gives rise to a title.

Facts which are, (1) Acts or (2) Events.

Thus suppose A buys a piece of land; A is the subject of the right, persons in general (as we shall see later on) are bound by the duty, the content of the right consists in the non-interference with the exercise of his rights to the land by A; the object of the right is the land; and the fact (title) is the act, *i.e.*, the conveyance by which the land was sold.

Illustration.

It is necessary to consider the terms person, thing and fact, including event and act which occur in the foregoing analysis.

I. PERSON.

In law there may be men who are not legal persons, and conversely there are persons who are not men. Thus slaves are destitute of legal personality in those systems of law which regard them as incapable of rights or duties, and joint-stock companies or municipal corporations are persons only in the eye of law. What then is the legal conception of personality?

In legal theory, whatever is capable of rights and duties is a person. A person is either (i) natural or (ii) artificial.[2]

Person either natural or artificial.

[2] Also called legal, fictitious, juristic or moral.

What is a natural person.

(i) Natural Person. A natural, as opposed to an artificial person is a "human being who is regarded by law as capable of rights or duties," that is to say, who has got a 'status.' The *status* of an individual, used as a legal term, means "the legal position of the individual in, or with regard to the rest of the community." Besides the general capacity or status, a man may also possess various special capacities such as liberty, citizenship, and family rights.

Status defined.

Characteristics of natural person.

Characteristics of a natural person. A natural person must be (1) a living human* being, *i.e.*, (*a*) he must be no monster; (*b*) he must be born alive; [but an infant *en ventre sa mere* (in the womb) is, by a fiction of law, considered to be born for many purposes, thus a child in the womb was an exception to the rule of Hindu Law that a bequest could not be made to a non-existent person:] (*c*) he must not have ceased to live; (2) he must be recognised by the state as a person, that is to say, he must not be a slave or must not have suffered civil death by being banished or by abjuring the realm or entering into religion. These two characteristics combine to give a

* *The legal status of the lower animals.* Beasts may be objects of rights and duties but never their subjects. In two cases however beasts may be thought to possess legal rights. In the first place cruelty to animals is a criminal offence and secondly a trust for the benefit of particular classes of animals is valid as a charitable trust. But these instances form no real exception. For the duties towards animals in these cases are conceived by law as duties towards society.—Salmond.

human being his personality, which may be of different grades depending on his freedom, maturity, sex, sanity, etc. Thus different personalities are sustained by an adult and a minor.

(ii) **Artificial Person.** An artificial, conventional, juristic, fictitious or moral person is such a group of human beings, or mass of property, as is, in the eye of the law, capable of rights and duties, in other words, to which the law gives a status.

What is an artificial person.

B. L. 11 (*a*), 12 (*a*).

Classification. An artificial person may be either (*a*) a universitates personarum, that is, an aggregate of human beings, *e.g.*, the state, a corporation, etc., (*b*) or a universitates bonorum, that is, an aggregate of rights and duties which is treated by law as a person for the sake of convenience, *e.g.*, the estate of a bankrupt.

Artificial persons classified.

B. L. 17 (*a*).

Creation. An artificial person is created by the law giving to a group of persons or mass of property the character of a legal person. The legal character is conferred, when the group or mass satisfies certain legal provisions, *e.g.*, the formation of a joint stock company in India when the group of persons satisfies the provisions of the Indian Companies' Act; or when a Corporation is formed by an Act of the sovereign, *e.g.*, the formation of the East India Company by the Royal Charter.

How created?

Extinction. A universitates personarum comes to an end (*a*) by failure of its component

How extinguished?

parts, (*b*) by judicial proceedings leading up to the winding up of a company; (*c*) by forfeiture and (*d*) by surrender of privileges.

II. THINGS.

What is a thing?

Whatever the law regards as an object of right is a thing.

Things classified.

Things are variously classified in law. The chief division is that into :—

(i) Res corporales and res incorporales.

(i) *Res Corporales* and *Res Incorporales*. Res Corporales mean material objects or physical things, which are defined by Holland as permanent external causes of sensation,[3] e.g., houses, trees. Physical things may be said to be of three kinds: (1) a simple thing, e.g., a cloth or (2) a compound thing, e.g., a house or (3) an aggregate of distinct things regarded as a whole, e.g., a regiment.

Res Incorporales are intellectual or artificial things. These are intangible, e.g., a copyright, a patent-right, etc.

Other classifications of things are :—

(ii) Divisible and indivisible.

(i) Things divisible and indivisible. A thing is divisible in law, when it can be divided without impairing its essence, e.g., a flock of sheep. It is indivisible, when it cannot be so divided, e.g., a horse. A horse is physically divisible but legally indivisible, because by division the parts are not horses.

[3] A thing may be distinguished from an event by the fact that a thing is a cause of repeated sensations whereas an event is transitory.

(iii) Things movable (*res mobiles*), e.g., a box, and immovable (*res immobiles*), e.g., a hill. (iii) Movable and immovable.

(iv) Things principal and things accessory. (iv) Principal and accessory.

(v) Things which are capable of private ownership (*res in commercio*), e.g., house, furniture, and things not capable of private ownership (*res extra commercio*) e.g., river etc (v) In commercio and extra commercio

(vi) Things consumed by use, e.g., food, and things not consumed by use, e.g., a road. (vi) Consumed by use and not consumed by use.

(vii) Fungible and non-fungible things Fungible things are those which belong to a given class, all of which are practically of the same quality, e.g., a rupee. Non-fungible things are those that have got their distinctive individualities, so that one cannot be indifferently exchanged for another, e.g., a painting by Raphæl. (vii) Fungible and non-fungible.

III. FACTS.

Facts are either events or acts. What are acts?

(i) Events. Events, according to Professor Holland, are either movements of external nature, e.g., a landslip, or the death of a relation, or the acts of a human being other than the being whose rights or duties are in question. Lapse of time, change of place and death are the most important legal events. (1) Events. *H. L.* 16 (a).

(2) Acts defined.

(ii) Acts. Acts are movements of the will. In the widest sense of the term, acts are either inward or internal, or outward or external. The former are acts of the mind while the latter are acts of the body. For the purposes of the legal science, act is only outward and may be defined as a determination of the will producing an effect in the sensible world.

B. L. 17 (*a*).

Of acts so defined some are positive, *i.e.*, of commission, others are negative, *i.e.*, of omission. Acts of omission are forbearances.

An Act analysed. *B. L.* 10 (*a*). *B. L.* 13 (*b*)

Essentials of an act. The essential elements of an act are: (1) an exertion of the will, (2) an accompanying state of consciousness, and (3) a manifestation of the will.

1. Will.

1. Will. An act of will is "the psychical cause by which the motor nerves are immediately stimulated or the inward state which as experience informs us, is always succeeded by motion while the body is in a normal condition" (Holland). The will is essential to an act; so, if an act is caused by physical compulsion (vis absoluta) there is no act because of the absence of will, *e.g.*, when the hand of a person is forcibly guided in singing his name. Sometimes the will may be present due to being coerced by threats, undue influence, etc. Here the act is not the result of free volition and hence does not produce all or some of its legal consequences. Thus in English law, a contract obtained by undue influence is voidable.

If exertion of the will be one of the essentials of an act it may be asked, how an artificial person, e.g., a corporation, can act, *i.e.*, how can it exert the will. The answer is that it will do so by a representative or by a majority of its members.

11. The second element of an act: consciousness.

II. **Consciousness.** The second essential of an act is an accompanying state of consciousness, regarding the consequences of the act. When I do an act, I exert my will and proceed to make it manifest by a muscular movement. But when I make the muscular movement, I am conscious of certain results which are likely to follow from the muscular movement. These results are of two kinds; some of them are those to the attainment of which I make the muscular movement. These are said to be *intended*. Others are known to be likely to follow from my act but are not intended. These are said to be due to negligence.

Intention.

(*a*) INTENTION Intention is important because law takes no account of a bodily movement in which there is no intention or negligence. When the doer of an act adverts to its consequences and desires them to follow he is said to intend the consequences. So intention involves a kind of intelligence, *i.e.*, the power of foreseeing consequences on the part of the doer of an act. But some people are below the average standard of intelligence, while others may act under restraint or with perverted intelligence. In all these cases

What it means.

Chief grounds of exemption from legal liability.

intention is impaired and hence the persons concerned are excused from liability for their acts. The chief grounds for such exemption are the following:—

(1) Insanity. An insane person or a lunatic is not responsible for his acts, for he has not the consciousness necessary to enable him to intend the acts.

(2) Minority. Intention is absent in a person who has not attained the years of discretion. Thus the Indian Penal Code lays down a general exception to the effect that nothing is an offence which is done by a child under seven years of age

(3) Intoxication. Intelligence may be temporarily suspended by intoxication, or temporary delirium. In such cases law regards the person so affected as incapable of understanding or of forming a rational judgment as to the effects of his determination of the will upon his interests. Thus according to the Indian Contract Act contracts by a person in a state of drunkenness are void.[4]

Ignorance.

Ignorance. Intelligence may be perverted by ignorance or mistake. A distinction is

[4] In the Criminal Law of India drunkenness is only a valid excuse if the thing which caused the intoxication was administered to the person without his knowledge or against his will The point is that intoxication affects intention wholly or partially.

generally drawn between ignorance of law and ignorance of fact.[5] Of law and of fact.

Ignorance of Law. Ignorance of law is no excuse for breaking it. *Ignorantia juris neminem excusat.* In Roman Law the strictness of the maxim was relaxed in the cases of women, soldiers and persons under twenty-five unless they had good legal advice within reach. The reason of this rule is variously stated. Ignorance of law is not an excuse. Reasons of the rule.

(1) The Romans thought that ignorance of law is not an excuse for the law is definite and knowable. But as against this view it may be said that to expect all people to know the law is only utopian and not practical. Blackstone varied this by contending that it is the duty of every man to know that part of the law which concerns him (1) Law is knowable.

(2) Secondly, as law is in most cases derived from the rules of natural justice, it is sometimes said that although a man may be ignorant that he is breaking the law, he knows very well that he is acting unjustly and dishonestly. Against this view it may be urged that it is not always true that people breaking the law are also acting dishonestly (2) Law is based on natural justice.

(3) Thirdly, it has been said that if ignorance of law were admitted as a ground of exemption, the court would be involved in (3) If rule is not accepted then ad-

[5] Neither in the Roman law nor in modern Continental systems is the distinction drawn between errors of law and errors of fact with the same sharpness as in England. Markby.

Administration of justice becomes impossible.

questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible. This reason of the rule is stated by Austin and according to Professor Holland it is no doubt the true reason.[6]

Austin and Holland.

Ignorance of fact.

Ignorance of fact. Ignorance of law is not excuse but ignorance of fact is often so. The law on this subject is somewhat complicated. So far as English law is concerned the general rule is that mistake of fact is an excuse within the sphere of criminal law while in civil law responsibility is commonly absolute.

Chance: what it is.

Chance. Chance or inevitable accident is commonly recognised as a ground of exemption from liability. Results which follow from acts without being intended are said to be due either to chance or to negligence. The difference between chance and negligence lies in this that whereas in chance the doer of the

Chance and negligence distinguished.

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[6] But Austin's view does not satisfy Markby and Mr. Justice Holmes. According to Markby alleged errors of fact are as difficult to investigate as alleged errors of law. Mr. Salmond also offers the same criticism. Mr. Justice Holmes says "every one must feel that ignorance of the law could never be admitted as an excuse even if the fact could be proved by sight and hearing in every case." According to him the true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament and faculties. Mr. Salmond says, "the fact seems to be that the rule in question while in general sound does not in its full extent and uncompromising rigidity admit of any sufficient justification."

Criticism of Austin's view.

act has no means of foreseeing the results, in negligence he might have foreseen them if he had taken more pains to inform himself.

(b) NEGLIGENCE. It is difficult to describe negligence. It is either a state of the mind or a conduct resulting from such mental state. As a state of the mind negligence may be defined as the mental attitude of undue indifference with respect to one's conduct and its consequences. But such undue indifference is not culpable unless an unlawful conduct results therefrom. The foundation of a tower may be weak to the knowledge of the owner, but until the tower falls and does injury, the owner cannot be sued.[7]

Negligence: what it is. *B. L.* 10 (*b*).

Standard of measurement. The mental phenomenon of negligence has sometimes got to be legally examined.

Standard of measuring negligence *B. L.* 10 (*b*).

In enquiring into the alleged negligence of a person, lawyers have tried to ascertain whether his acts conform to an objective standard of carefulness. There may be two such standards. (1) Sometimes negligence or the want of due diligence is measured by the amount of care, which the person, whose conduct was

[7] Austin distinguishes between —

1. *Negligence*—the state of mind of one who inadvertently omits an act and breaks a positive duty. Negligence.

2. *Heedlessness*—the state of mind of one who inadvertently does an act and breaks a negative duty. Heedlessness.

3. *Rashness*—which resembles heedlessness, except that the party who does the act adverts to its consequences but insufficiently. Rashness.

Two standards.

Culpa in concreto.

Culpa in abstracto.

called in question was wont to show in the management of his own affairs. Conduct not conforming to this standard is called *culpa in concreto*. (2) It may be also measured by the care which would be exercised under the circumstances by the average good citizen. Conduct falling short of this is caled *culpa in abstracto*.

This abstract standard is being applied in the modern decisions of the English and American courts. Thus in Engand, actionable negligence has been described as the omission to do something which a reasonabe man would do or the doing of something which a reasonable man would not do.[8] In America Mr. Justice Holmes has held that in determining civil liability of a man on the ground of negligence, law deliberately leaves his idiosyncracies out of account, and assumes that he has as much capacity to judge and to foresee consequences, as a man of ordinary prudence would have in the same situation.

Two degrees of negligence.

Two degrees of negligence. The care which a person is required to use in his conduct is of two degrees: (1) that which is due from persons generally, (2) that which is due from persons "occupying positions which mark them out as being exceptionally reliable

The analysis is too subtle and for practical purposes, negligence may be regarded as including heedlessness and rashness

[8] Per Alderson B. in Blythe v. Birmingham Water Works Co., 11 Ex. 781.

with reference to the matter in question." Persons of the former class are only liable for gross negligence or *culpa lata*; persons of the latter class who are otherwise called specialists are responsible for *culpa levis* or ordinary negligence. They profess to posses a high standard of efficiency and therefore they are liable for slight deviation from such standard.

Negligence may consist either in 'faciendo' or in 'non-faciendo,' being either non performance or inadequate performance of a legal duty.

III. **Expression.** The third essential element of an act is the manifestation or expression of the will, which may be express or tacit and may be manifested or expressed by the party willing, or by an agent, in which case the act of the agent is the act of the principal (*qui facit per alium facit per se*; he who does anything through the instrumentality of another, does it himself). The manifestation may either be formal, *e.g.*, where law requires that a sale of land should be by registered writing, or informal.

III. Expression.

Formal and informal expression.

Classification of acts. Acts are either lawful or unlawful. The juristic result of the unlawful acts is never that aimed at by the doer. Some lawful acts depend on the intention of the doer, while others do not.

Juristic Acts. Where the legal result follows because that result was itself contemplated, the act is variously called by English writers a "juristic act" or "act in the law." It is de-

What are juristic acts? *B. L.* 12 (*a*). 21 (*a*).

fined by Windscheid as "a manifestation of the will of a private individual directed to the origin, extinction, or modification of rights."[9]

Elements of a juristic act. B. L. 12 (a).

Like all acts, Juristic Acts must exhibit an exertion of the will accompanied by consciousness and expressed. The legal result is also nullified or modified by the existence of error, compulsion, fear, fraud or any circumstance preventing the free exercise of volition. The juristic acts may also be performed by agents and are either unilateral or bilateral.

Juristic acts when void and when voidable.

Juristic acts which are wanting in the requirements of such acts are either void or voidable. When the wanting requirements are essential, the act is void from the beginning—the act being a mere nullity; where, however, the deficiency is one which may be supplied by a subsequent change of circumstances (*e.g.*, where the defective authority of an agent is subsequently ratified), or where it may be waived by the party to be bound, as in the case of fraud or compulsion, the act is not void but voidable, *i.e.*, liable to be attacked by the party sought to be bound by it.

Mistake makes act voidable.

Mistake. The most important circumstance which makes an act voidable is mistake or

Act in the law and act of the law.

[9] *Act in the law and act of the law.* An act in the law (which may be called, though not very happily, an act of the party) has been defined above. An act of the law, on the other hand, is the creation, extinction, or transfer of a right by the operation of law itself, independent of any consent thereto on the part of him concerned.

error. Errors, according to Savigny, are either spurious or genuine. Spurious or negative errors are those which prevent a juristic act from coming into existence on the ground that there is no correspondence between will and its expression Genuine or positive errors are those that prevent an act from producing its legal effect. Mistakes classified.

The correspondence of will and its expression. Following Roman Law, Savigny has laid down that in order to the production of a juristic act, the will and its expression must be in correspondence. But it is very difficult and sometimes impossible to find out this correspondence. Need will and its expression be in correspondence?

The cases in which the will and its expression may differ may be distinguished as follow. The difference may either be intentional, or unintentional. Intentional difference may result from a mental reservation, or it may be the result of use of words, which produce a juristic act without any intention to that effect: e.g., when legal phrases are used in jest or on the stage; or when a phrase, appropriate to a juristic act of one kind, is applied to produce another; or when persons agree to give a meaning to their words which they do not usually bear. Unintentional mistake is due to essential mistake and therefore prevents the production of a juristic act A recent school of writers maintains that in enumerating the requisites of a juristic act, the will may be left out of consideration, and only its external ex- They may sometimes differ.

pression may be taken into account, as is done in the case of contracts.

We have already said that acts (including juristic acts) are sometimes required to be expressed in a particular form.

Agency. Like all other acts juristic acts may, in most cases be performed through an agent. An agent is a representative whose instructions allow him to exercise an act of will on behalf of his principal, (and herein he differs from a messenger who only communicates the will of his principal), to act, to some extent, at his own discretion (Holland). The authority of the agent may be either express or implied. The modern tendency is to extend the principle of agency.

Unilateral and bilateral acts. We have already said that juristic acts are of two kinds, unilateral or one-sided, and bilateral or two-sided. A unilateral act is one in which there is only one party whose will is operative, as in the case of the maker of a will. A bilateral act, on the other hand, is one which involves the consenting wills of two or more distinct parties, e.g., a contract, a lease, etc.

Characteristics of a juristic act. **Characteristics of a juristic act.** The characteristics of a juristic act of any given species, are divided into those which are essentialia, naturalia and accidentalia negotii.

Essentialia. The 'essentialia' of an act are those facts which constitute the very essence of the act without which it could not exist. Thus in a

contract of sale, a fixed price is the 'essentialia.'

The 'naturalia' are those facts which the law itself presumes from the act, though the presumption may be contradicted; *e.g.*, the presumption in Roman Law that property in goods did not pass till the price had been paid. Naturalia.

The 'accidentalia' are those facts which are not essential and which must be proved, as for instance, that the purchase money in a sale-contract shall be payable with interest from the date of the contract Accidentalia.

If an act is deficient in any one of the essentialia negotii, it is null and void Sometimes the deficiency can be waived or is cured by lapse of time. Sometimes the act is voidable at the opinion of one of the parties Effect of the want of any of these elements.

The naturalia and accidentalia can be waived by the will of the parties to the act Such variations are called condition A condition is 'suspensive' when the commencement and 'resolutory' when the termination of the operation of the act is made to depend upon its occurrence A condition.

CHAPTER VIII.

The Kinds of Legal Rights.

Rights classified. *B. L.* 10 (*a*), 11, 13 (*a*) & (*b*), 15 (*b*).

In this chapter we shall discuss the principal modes of classifying rights. Rights are either I. Public or Private (having regard to the public or private character of the persons concerned). II. Normal or abnormal (having regard to the normal or abnormal status of the persons concerned). III. In personam or In rem (according as the person of incidence is limited or unlimited in extent) and IV. Antecedent or Remedial (having regard to the act being due for its own sake or being due in default of another act). But this is only a cross-division and therefore a particular right may be classified under one of the alternatives of each of the several divisions.

Public and private rights.

Normal and abnormal rights.

Rights in rem and rights in personam.

Antecedent and Remedial rights.

I. Public and private rights. The Principal division of rights is the one dependent on the distinction between the public or private character of the persons concerned.

What is a public person?

"By a public person we mean either the state or the sovereign part of it, or a body or individual holding delegated authority under it."

What is a private person?

"By a private person we mean an individual, or a collection of individuals however large, who or each one of whom, is of course a unit of the state, but in no sense represents it, even for a special purpose."

When both the person of inherence as well as the person of incidence are private persons or subjects, the right is called private and the law touching the relations between subject and subject is called 'Private Law.' When either of the above persons is the state, the right is called Public and the right between the subject and the state or *vice-versa* is the concern of the Public Law. Public and private rights defined.

Corresponding division of law into public and private. The division of rights into public and private leads to the division of law into public and private. *B L. 15 (b)*

According to Professor Holland this is the radical division, and for the following reasons: (a) The division is logically consistent for it places, under one head, the rights which affect subjects both as persons of inherence as well as persons of incidence and it places under a different head the rights which affect the state either as person of inherence or as person of incidence. (b) Moreover the division of law dependent on the distinction between public and private persons is the primary one and it has the sanction of history being as old as Aristotle The Roman Jurists also recognised the importance of this distinction (c) In the last place, the division is convenient for the purpose of arrangement, for, in accordance with it" constitutional, ecclesiastical, criminal, and administrative law, on the one hand, and the law of contracts, of real and personal property, of wills and succession and of torts on *B L 10 (a)* Importance of this mode of division. *B L. 13 (b), 14 (b)* *B L 10 (b), 16 (a).*

the other hand, form two groups, to one or other of which every legal topic may be readily referred."

Public and private law distinguished. *B.L.* 10(*b*), 16 (*a*).

In Public Law the state which defines and protects a right is itself interested in or affected by it. When it enjoys the right it will exact the same of its own accord and when it is the person of incidence, it may refuse to fulfil its obligation. In Private Law the person interested in and the person affected by the right are both private persons.

The distinction illustrated.

An illustration will make this distinction between Public Law and Private Law clear. A conspirator against the state violates public right, for the state has a right not to be conspired against, and he is punished according to public law. But if my tenant does not pay rent my private right is violated, the tenant and myself being both private persons, and the rent will have to be realised according to private law. It must be noted, however, that an act may infringe a private as well as a public right at one and the same time. Thus an assault which violates the right of the person assaulted not to be molested also violates the right of the state not to be hindered by an act likely to disturb public peace.

Austin's views. *B.L.* 13 (*b*)

But Austin does not consider that this is the primary distinction. He divides law into law of persons and law of things. He sub-divides law of persons into public law and private law

*B.L.*10 (*a*).

Thus according to him public law is the law of

Holland.

political status Professor Holland does not

agree with Austin in this as well as in the latter's classification of duties into absolute and relative. See Ante pp. 71—72.

Municipal Law.

Public and Private law together constitute what is known as Municipal Law, which regulates the right between subject and state or subject and subject. But there is also a third kind of law called International Law which regulates the rights between state and state.

International Law

How far is international law law at all?

If we accept Professor Holland's definition of law, as a general rule of external human action enforced by a sovereign political authority, we must regard International Law as law by courtesy or analogy only, for here no political arbiter is present whereas in Municipal Law such an arbiter is present, although he is sometimes one of the parties and sometimes not. But the expression International Law is in common use "to express those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of civilized world, nations are expected to act."

Law of persons and of things. R. I. 13 (b), 20 (a).

II. Normal and abnormal rights. The second mode of dividing rights is that based on the normal or abnormal status of the persons concerned. Rights may thus be classified into (1) those in which the status of the persons requires to be specially considered; (2) and those in which that is not so.

Law of persons and things. The above classification of rights has led to the division of law into law of persons and law of things.

We have seen in the previous chapter that a right has four essential elements, the person of inherence, the object, the act and the person of incidence. Thus the first and the fourth elements are the same, *viz.*, person, while the second and the third relate to things. Hence practically there are two elements, *viz.*, persons and things. Law may therefore be divided into law of persons and law of things.

The equivalent Roman expressions

The expressions used in the above distinction are derived from the Romans, who divided (though probably not very scientifically) law into *Jus quod ad personas pertinet* or *jus personarum* (law of persons) and *Jus quod ad res pertinet* or *jus rerum*[1] (law of things). Professor Holland does not accept the above mentioned expressions and suggests 'normal' and 'abnormal' as better substitutes. In giving reasons for his proposal, he says that the Latin expressions are full of ambiguities. Moreover, a right varies as one or other of the four elements of it varies, but the possible variations of two of them (*viz.*, persons of inherence and of incidence) are less than those of the other two (*viz.*, objects and acts). This is so not only

Professor Holland suggests 'normal' and 'abnormal'

[1] The expression *Jus rerum* as an abbreviation of *Jus quod ad res pertinet* was introduced by the later Roman Jurists. The above method of division was adopted by Hale who was followed by Blackstone. Similarly Bentham divides law into 'particular' and 'general,' M. Blondeau into law of Capables and law of incapables and Poste into law of Equals and Unequals. Westlake's division depending on 'status' is on a similar basis.

because both of the two former elements are persons and thus liable to the same variations, but also because the characteristics of a person are less variable than those of objects and acts (*i.e.*, things). Thus the proper mode of studying a body of laws is first to take it generally *i.e.*, without regard to any peculiarities of personality (law of normal status), and then to consider the variations of personality (abnormal). So the expressions 'abnormal law,' and 'normal law' are better than 'law of persons' and 'law of things.'

Professor Holland further points out that even if it be convenient to draw a line separating the field of law of person from that of law of things, there is a difficulty in fixing as to where the line of demarcation should be actually drawn. The true test according to him is this. Does the peculiarity of the personality arise from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence? Thus a landlord has no peculiarity apart from the acts which he can enforce against the tenant *viz.*, payment of rent, etc.; but if he is an infant his rights are modified in various ways. Such affections of personality as cause modifications of right are of two kinds. The person may be artificial (*e.g.*, a corporation) or the person may be under disability on account of age, sex, etc.

B.L. 13 (*b*)

The true test of personality

Holland.

While stating the true test, Professor Holland criticises the test laid down by Austin accord-

Professor Holland

Criticises Austin.

ing to whom the marks of status or personality are three : (1) residing in a person as a member of a class, (2) residing in a class, (3) residing in the person. But these marks are not sufficiently distinctive as they will be found not only in infants and lunatics (to whom law gives a special status), but also in landlords and stock-brokers who as members of a class do not possess any special status. Professor Holland also rejects as insufficient the view (Anson's) that status is such as cannot be varied by contract.

The division traced in Private Public and International law.

The division of law into law of persons and law of things may be traced in private, public and international law. In private law, the law of persons describes the ways in which the general law is modified on account of varities of status; in Public Law, it is the description of the state, of the government and of other bodies or persons having delegated authority: and in International Law, the law of persons deals with the characteristics of a fully sovereign state and the result of absence of these characteristics. Again the law of things in private law, is a description of the various kinds of rights enjoyed in private capacities by persons as subjects of the state and not as representing the sovereign; in public law it consists of administrative law and criminal law ; and in international law it is a description of the various kinds of rights enjoyed by states.

Rights in rem and rights in

III. Rights in rem and rights in personam. The third division of rights is into rights in rem and rights in personam. A right in

rem (*jura in rem*) is a right that is available against the whole world. The right of the owner of a house to use it exclusively is available against the whole world so that the rest of the world is under an obligation not to interfere with that right. A right in personam (*jura in personam*) is one that is available against determinate individuals. Thus the landlord's right to have rent is available only against the tenant.[2]

personam. B.L. 10 (*a*), 11 (*b*), (12) (*b*), 13 (*a*), 16 (*b*).

'In rem.'

'In personam.'

IV. Antecedent and Remedial rights. The fourth division of rights is that into antecedent and remedial rights. An antecedent right is one which exists indeperdently of a wrong having been committed. A remedial right is one that is given by way of compensation to a person whose antecedent right is violated. Thus a servant has an antecedent right to get his wages from his master. It is antecedent, for it exists independently of any wrong having been committed by the master. But if the master commits a wrong by not paying the wages in time, the servant will have a remedial right of suing the master. The expressions 'primary,' 'sanctioned' and 'of enjoyment' are sometimes used as substitutes of 'antecedent'. So 'secondary,' 'sanctioning,' and 'of redress are used for 'remedial.'

Antecedent and Remedial Right. B.L. 10 (*a*), 11 (*b*), 13 (*a*)

B.L. 12 (*b*)

Equivalent expressions.

[2] The Romans used expressions Jus in re and Jus ad rem in place of rights in rem and rights in personam. Hugo used 'rights against individuals' and 'rights against the world.' Professor Holland suggests 'rights of determinate' and 'rights of indeterminate incidence.'

CHAPTER IX.

Rights at Rest and in Motion.

The order of our study.

The order of our study. We began by defining Jurisprudence as the science of Law. We next defined *law* and found that the immediate object of law was the creation and protection of legal *rights*. This led us to analyse legal rights and to *classify* them. We have seen in the preceding chapter that various modes of classifying rights give rise to various kinds of law. We have further seen that of the various classifications the division of law into private, public and international is the most convenient. The order of our study will be to consider the various kinds of rights under each of these topics, *viz.*, private, public and international. Each of these kinds of rights, again, has to be considered under two aspects, either as at *rest* or in *motion*, that is to say, we shall not only study the nature and scope of each kind of right but also the causes which originate or terminate them. We shall commence this method of enquiry in the next chapter. In the present chapter we shall make certain general observations regarding rights at rest and rights in motion.

B L 09 (*b*), 10 (*a*), 14 (*a*) & 14 (*b*).

The object of the present chapter.

Rights at rest.

I. Rights at Rest. To study a right as at rest, *i.e.*, its nature and scope, we must consider its orbit and its infringement. "By its *orbit* we mean the sum or extent of the advan-

tages which are conferred by its enjoyment. By its *infringement* we mean an act in the strict sense of the term which interferes with the enjoyment of those advantages." 'Orbit' and 'infringement' are correlative terms and the knowledge of one implies the knowledge of the other; so much so that often the orbit of a right is ascertained by an enumeration of the acts which are violations of it

Orbit.

B L. 10 (a) 14 (b), 16 (b)

Infringement.

CASES WHERE INFRINGEMENT IS NOT REAL. An act which apparently infringes a right may not be a real infringement in the following cases —

Cases where infringement is not real:

(1) Where the apparent act is no act at all; *i.e.*, where the result is due to circumstances over which the agent had no control, *e.g.*, where a horse getting frightened by a noise becomes unmanageable and does damage

(2) Where the apparent act is not the true cause of damage. Thus in the famous Squib case (Scott v. Shephard) a Squib was thrown by A at B, and B to get rid of it threw it at C, and it was thus passed on, till ultimately it hit and injured *Z*. Here the damage was due to the act of A and not that of the last thrower. For he who does the first wrong is answerable for all the consequential damages. Professor Holland thinks that the decision in this case might have been otherwise, as law will refuse to regard an act as the cause of a result which is "too remote" or to which the injured party contributes by his negligence. The result is too remote from the act when they are not "con-

Contributory negligence.

catenated as cause and effect." A person is guilty of contributory negligence when he so acts as to become a ' co-operative cause ' of his own injury. Thus when the cattle of a person stray on the railway line and are injured, he is said to have contributed to the injury, if he did not negligently get the gates shut up. But there is no contributory negligence when the injury could be avoided by the " ordinary care of the wrong-doer."

(3) When the right infringed has been waived: ' *Volenti non fit injuria.* When a right is waived freely and with knowledge of the circumstances, an act which would other wise be an infringement may become permissible.

(4) When a right is forfeited, an act otherwise illegal becomes legal; *e.g.*, an assault is not actionable when it is shown that it followed a forcible entry into defendant's house and refusal on the part of the plaintiff to vacate it.

(5) Public Policy. Thus trespass on another's land adjoining to a high way is not actionable, when the highway becomes impassable

Besides the person apparently infringing a right, others might be held reponsible for the infringement Thus in accordance with the maxims ' respondeat superior ' and 'qui facit per alium facit pe se,' a person is liable for those acts of his agents or servants which were authorised by him or which were done by them in the course of their employmtnt. The one

B.L. 11 (*a*), 12 (*b*).

exception to this general rule is that subject to certain statutory restrictions, one fellow-servant cannot recover damages for injuries sustained in their common employment from the negligence of a fellow-servant, unless such fellow-servant be an unfit person for the employment.

Rights in motion.

II. Rights in motion. The origin, transfer and extinction of rights are due to facts which are either acts or events A fact originating a right has long been known as title.

Classification of facts.

Bentham's nomenclature of facts. Bentham divides facts into (1) *investitive*, *i e.*, originating rights; (2) *divestitive*, *i.e* , extinguishing rights; and (3) *translative*, i.e., transferring rights. The whole class of facts is described as *dispositive*.

Investitive facts.

1. *Investitive facts.* An investitive fact may be either (*a*) a direct act of the sovereign power, as when a privilege or monopoly is granted, or (*b*) a fact which brings a particular case within a general law, *e.g* , the death of an ancestor bringing in the operation of the law of inheritance. In the former case the fact is a *privilege*, in the latter it is called a *title*.

Divestitive facts. 13 L. 16 (*b*).

2. *Divestitive facts.* A fact terminating a right is called a divestitive fact. Thus the sale of a property terminates the right of its owner.

Translative facts.

3. *Translative facts.* In the above illustration, the sale not only terminates the rights of the transferor, but also creates a right in favour of the transferee. Thus one fact may be looked upon both as divestitive as well as investitive. Such facts are called translative.

Translative facts are either *voluntary*, *e.g.*, sale, contract, will, etc., where the right passes on account of a voluntary act, or *involuntary*, *e.g.*, death, bankruptcy, escheat, etc., where the passing of the right depends on an external event. Voluntary translative facts are also called alienations, which may be either gratuitious or for value.

A translative fact may operate, *i.e.*, a right may pass from one living man to another (inter vivos), *e.g.*, in a sale, or from a dead person to a living person, *e.g.*, in a will, but never from a living person to one who is dead. Again a right may pass from a natural person to an artificial person or from one artificial person to another The right translated cannot be greater in extent than the original right. But it can be of less extent, as in the case of an easement, or of equal extent in which case it is called a succession.

Singular succession.

Universal succession. In a universal succession either singular or universal. When one or more distinct rights pass by it, the succession is called singular, *e.g.*, the passing of a leasehold interest. A legacy is a form of singular succession. It is a "deduction from an inheritance for the benefit of some one."

Universal succession.

Universal succession. In a universal succession, the whole bundle of rights and duties of a person passes: e.g., the succession of the executor. The most important kind of universal succession is the passing of the rights of a

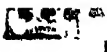
deceased person. Such succession may either be intestate or testamentary.

Intestate succession. Intestate succession is historically earlier than testamentary succession. In early times, individual ownership was but little known, the idea was that "property really belonged to a family group and that the right of an individual was merely to administer his share of it during his life-time." Thus when a man died his property devolved on his children, failing them, it vested in certain collaterals and in their default, it went to the members of the gens or clan. Later on, it was perceived that these rules did not always secure the best provision for the family, and this led to the introduction of wills by which a better provision could be made. Intestate Succession.

Testamentary succession. Thus wills arose out of the necessity of selecting the heir. As such a selection was an invasion of the rights of the members of the family it had to be ratified by the legislature Wills were then publicly made Afterwards they became private The following topics are to be considered in studying wills: (*a*) the capacity of the testator, his age, etc; (*b*) the capacity of the person who takes under the will; thus attesting witnesses are not allowed to take under a will; (*c*) the contents of the will; (*d*) the effect of the operation of mistake or undue influence on the testator; (*e*) the causes which invalidate a will; Testamentary succession. B.L. 09 (*b*), 10 (*b*), 11 (*a*).

(*f*) conditions precedent to the operation of the will and (*g*) power of the heir executor, etc., to refuse to take under a will or to claim to be relieved from liabilities in excess of assets.

CHAPTER X.



Private Law: Rights in rem.

Adopting as the basis of our treatment the grand divisions of law into (1) Private, (2) Public and (3) International, we now proceed to deal with the first branch of our subject in all its details.

Substantive and adjective law. Private law is either substantive or adjective Substantive law defines the rights of individuals, while adjective law indicates the procedure by which these rights are enforced. Again the rights dealt with in substantive law are either Normal or Abnormal. If the persons with whom these rights are connected, are of the ordinary type, the rights are normal, while, if the persons deviate from the ordinary type they are abnormal.

Substantive and Adjective law.

Antecedent and Remedial Rights. Now every right, whether normal or abnormal may be considered from a twofold aspect, (*a*) as a right existing independently of any wrong having been committed when it may be called an antecedent or primary right; (*b*) and as furnishing the ground for a remedial action for compensation, when it has been infringed or violated, and then it is called a remedial or sanctioning right. Lastly the antecedent rights are either rights in rem available against the

Antecedent and Remedial Rights.

Rights in rem and Rights in personam.

whole world (*e.g.*, ownership) or rights in personam which can be asserted against definite individuals, e.g., the landlord's right to rent against the tenant.

The above distribution may be shown clearly in the table given below :—

Private law:
is either

SUBSTANTIVE: defining rights which are		ADJECTIVE: defining procedure.
Normal		Abnormal
Antecedent	Remedial	Antecedent Remedial
In rem	In personam	In rem In personam

Holland's Classification of antecedent rights in rem.

We shall in the present chapter deal with the normal antecedent rights in rem and these may be said to fall under one or other of the following groups : I. the rights to personal safety and freedom; II. those relating to the society and control of one's family and dependants : III. the right to reputation; IV. the rights to advantages open to the community in general; V those relating to possession and ownership and VI. the right to immunity from damage by fraud. Let us discuss each of these several groups in detail

I. Right to personal safety and freedom: The first class comprises those rights which relate to personal safety and freedom, and which are the most widely enjoyed of all rights. In civilised countries, rights of this description are held to be the birth-right of a freeman and hence are called innate rights They are acquired by birth and last till death, though in the interval they may be (1) limited (as in the case of an infant during minority, when the parents and the guardian have a right to chastise him and to keep him in their custody), (2) waived (as in the case of a wrestler in a lawful contest) or (3) temporarily suspended (as when a man exercises a right of private defence) These are innate rights and by their nature they cannot be transferred.

Rirht to personal safety and freedom. B.L.16 (b).

How acquired.

The contents of this right. An individual has a right (1) not to be subjected to a threat or *menace* of injury, (2) not to suffer *assault*, (3) and not to be *wounded* or disabled in any way; (4) further he has a right that his freedom of action must not be interfered with in any manner A man has a right to act according to his pleasure, as for example, of going where he pleases, so long as he does not interfere with the rights of another, and any one who prevents him from exercising this right of freedom, commits a wrong for which the law allows a remedy; and if the restraint is of such a kind, as to prevent the person restrained from proceeding beyond certain prescribed limits, the offence is deemed to be one of wrongful

The contents of this right.

confinement, for which a heavy punishment is provided. Lastly an individual has a right (5) not to suffer injury from dangerous things kept by another or (6) from the negligent exercise of their own right by other persons, *e.g.*, when a man keeps his house in such a bad state of repair, as to jeopardise the safety of his neighbour.

Is there an antecedent right not to be killed

Right not to be killed. Is there an antecedent right not to be killed? No. An antecedent right can not be said to exist, if its infringement does not give rise to a remedial right. A remedial right arising on death, assuming that such a right arises at all, dies with the deceased and hence it cannot be said that he had an antecedent right not to be killed A personal action dies with the person, *actio personalis moritur cum persona.*[1]

Family rights.

II. Right to the society and control of one's family and dependants. The next class of rights in rem to which we must turn our attention is that very important group which centres round the family in its relation with the outside world. We thus exclude from immediate consideration the rights which each individual member of a family may have against the other members. These must be reserved for treatment with the other rights in personam which will form the subject of the next chapter.

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[1] Certain legislatures have however made an exception to this maxim; see for instance Statute 9 and 10 Vict. c. 93.

The family rights, which result indirectly or directly from the institution of marriage have been subdivided by Holland under four heads (1) marital rights, (2) parental rights, (3) tutelary rights and (4) dominical rights. Family rights subdivided.

(i) Marital Rights: The marital rights owe their origin to the institution of marriage. The form of marriage has varied in different times, and from forcible capture, or purchase of bride, it has now assumed the form of voluntary dedication of one to another generally hallowed by sacred rites. Marriage establishes the right of the husband to the society of his wife, which he can enforce against any one who seeks to deprive him of it by either forcing or inducing the wife to leave his protection or by seducing her. A corresponding right has been recognised by the American courts to reside in the wife also The marital rights are incapable of alienation or waiver. They continue so long as the marriage relation lasts, and cease upon the death of one of the parties, or when the marriage is dissolved by a court of competent jurisdiction. (i) Marital Rights.

(ii) Parental Rights. The parental rights are the rights of the parents to the custody and control of the offspring of the marriage, and to the produce of their labour until they themselves arrive at an age when the law concedes to them an independent capacity for action. They arise by birth or under some systems by adoption and cease with the death of the parent or child, or the child being transferred by adop- (ii) Parental Rights.

tion to another family or by the child attaining the age of majority or as the result of a judicial sentence. In the case of a female child, the right is lost on her marriage except in countries where infant marriages are customary.

(iii) Tutelary Rights

(iii) Tutelary Rights. The tutelary rights are the rights of the tutor or guardian. They are artificial extensions of parental rights. Parental rights can be delegated in the lifetime of the parent or by a testament to take effect after his death. A guardian or curator can also be appointed by court. The right terminates on the death of tutor or ward, on the resignation or removal of the tutor and on the marriage of the ward or his attaining a certain age. The tutelary right is infringed by any interference with the control of the tutor or curator over the person or property of the ward, lunatic or pro indivisa.

(iv) Dominical Rights

(iv) Dominical Rights. Under the class of family rights may also be included those which are acquired by contract, and which resemble to some extent, the dominical rights which in ancient times the master had with regard to his slave as against the outside world. Thus a master has the right to the services of his servant which he can enforce by an action for damages against everyone who deprives him of the benefit of his services. In like manner, the manager of an opera can claim damages from the manager of a rival house, who entices away his actress or singer.

111. Right to Reputation. The third class of rights mentioned above, concerns a man's reputation or good name. Every man has his moral worth in the political community of which he is a member, and he is entitled to have it respected by every other person within the same community, and any statement which conveys concerning any person any imputation tending to bring him into hatred, contempt or redicule, or being made concerning him in the way of his office, profession or calling, tends to injure him in respect thereof is deemed to defame that person. The statement must be untrue, and publication is essential, but words either spoken or written are not necessary. The wrong may be committed by gestures or even by pictures. Holland thus summarises the different grades of defamatory statements recognised in English law —

Right to Reputation.

Reason for this right.

Nature of defamation

Different grades of it.

(a) Some statements are wrongful without any respect to the mode in which they are published or to their consequences, e.g., the imputation of an indictable offence. (a)

(b) Others are wrongful if put into a certain form, i.e., if they are written, printed or suggested by pictures, when they are said to be libel. (b)

(c) Others are wrongful only if special and temporal loss can be shown to have resulted from their being made. (c)

Justification. A defamatory statement may be justified on the ground, that it is privileged. What is justification?

This is the case when the defendant was acting in a certain capacity, *e.g.*, as a Judge, an advocate, or a witness; or when the circumstances are of a certain class, *e.g.*, when a character is given to a servant. Statements made in the course of judicial proceedings or to a person having an interest in their being made, fair reports of trials, legislative debates, or public meetings, and fair criticism of literary and artistic production are privileged

Advantages open to the community

IV. Advantages open to the community in general. The fourth class comprises those rights which are somewhat of a vague character, and which consist in the enjoyment of the advantages open to the community in general

(a) to pursue profession

Thus (a) every man has a right to the unmolested pursuit of the profession or occupation by which he gains his living, provided it is not of an immoral character or contrary to law,

(b) use of public highways, etc.

(b) he has also the right to the unobstructed use of public highways and navigable rivers, and

(c) immunity from abuse of legal process

similarly (c) every man has the right to enjoy immunity from abuse of legal process The machinery of law exists for the purpose of preserving rights, and must not be used to the detriment of any individual Any one who does so is guilty of malicious prosecution.

v. Rights of property.

V. Rights of property. We now come to the rights of property which, as Professor Holland says, "are extensions of the power of a person over portions of the physical world." The subjects of these rights are *things*, understood in the wide sense, embracing the twofold

classification of material or physical objects perceptible by the external organs of sense, and artificial or purely intellectual objects which have no tangible external existence Certain things are incapable of proprietary appropriation, e g., air, sea, etc A thing is said to be mine by right when I am so connected with it that if any other person should make use of it without my consent he would do me an injury Hence the fundamental element which constitutes my right to a thing is the possibility of my excluding every person from the possession or use of it [2]

The right of property varies in extent from mere possession to the highest form of ownership or ownership Ownership of course the right to possession is not necessarily the ownership possession may exist apart from ownership when it is recognised as having peculiar legal consequences attached to it The possessor has the right to retain possession of the thing and that sometimes even against the owner himself The possessor's right to continue in possession of a thing is known as *Jus possessionis* and the owner's right to possess a thing is called *ius possidendi*.

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[2] According to Kant a man entirely alone in the earth could, properly speaking, neither have nor acquire any external thing as his own, for, between him as a person and all external objects as things there could be no relation of obligation There is no other person who by virtue of this relation would be excluded from the possession of the thing.

Two elements of possession.

B.L. 09 (*a*), 11 (*a*), 14 (*a*), 15 (*b*), 16 (*a*) 16 (*b*) & 21 (*a*).

What then is possession? The possession of an object "is the continuing exercise of a claim to the exclusive use of it." (Salmond.) It involves therefore two distinct elements, one of which is physical or objective, the other mental or subjective. There must be some power or control over a thing and secondly there must be an intention to avail oneself of that power. In the language of Roman jurists the first element is called *corpus*, the second *animus*.

(1) Corpus.

(1) **Corpus.** To constitute possession the animus is not itself sufficient; it must be embodied in a corpus. The intention must be effectively realised. The question is what amounts to such an effective realisation, in other words, what is meant by corpus. Corpus does not imply bodily contact. It is by no means necessary that the physical element should consist in the actual control of the thing whether it happens to be immovable or movable. Thus if money is locked up in a box and the box is conveyed to my house, the key being placed to my hands it cannot be doubted that possession has been completely transferred to me although I have had no actual corporeal contact with the box; or, to give a more homely illustration mentioned by the framers of the Indian Penal Code in their Report, it will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests are still in his possession. All that is necessary for the possessor is to have the physical power

Physical power to deal with the thing.

of dealing with the thing exclusively as his own. Thus a mountain pasture may remain in the possession of one who first appropriated it but does not visit it in the winter season; so also the purchaser of a quantity of wheat may be put in possession of the same by being given the key of the warehouse.[3] The delivery of the key of the storehouse is regarded in English law as the delivery of the goods because, as Lord Hardwicke puts it, it is the way of coming at the possession of or to make use of the goods.[4]

(2) **Animus.** Animus is the intent to exercise the physical power or corpus, that is to say, it is the intent to appropriate to one self the exclusive use of the thing possessed. This mental element may be manifested in three degrees. (2) Animus. Its three degrees.

(*a*) *Representative possession.* The lowest degree of manifestation of animus is found where a man has a right to protect the thing possessed from violence without asserting any right over it on his own behalf, e.g., a servant, who is entrusted with the property of the (*a*) Representative possession.

[3] Some say that according to the Romans this sort of possession was regarded as symbolical or fictitious. But Savigny shows that this was not the view of the Roman jurists.

[4] According to Salmond the true answer to the question what amounts to an effective realization of the animus is this: that the facts must amount to the actual present exclusion of all alien interference with the thing possessed together with a reasonably sufficient security for the exclusive use of it in the future.

master, can be said to have such right. This is known as representative possession.

(b) Derivative possession.

(b) *Derivative possession.* A higher degree of intention is found in the case of persons to whom objects are given for various purposes, e.g., a usufructuary, borrower, lessee, etc. Their possession is called derivative possession and it differs from representative possession in this that in the former there is an intent to exercise physical control for oneself.

(c) Possession of owner.

(c) The highest degree of intention is the denial of the right of any other than the possessor himself. Such intention is manifested by a person, who rightly or wrongly thinks himself to be the owner of the object or by a thief who knows that he has stolen it.

THEORIES OF POSSESSION.

Theories of Possession

The nature of intention necessary to constitute possession so as to arm the person exercising it with the possessory remedies provided by law, has been the subject of violent controversy amongst the members of the German School. Two opposite theories have been stated by Savigny and Ihering respectively though both of them appeal to Roman law for their authority. We shall consider the theory of Roman Law with the explanations given by Savigny and Ihering and also notice the Teutonic and English views of the question.

A. Roman Theory. B.L. 09 (a) 13 (b), 15 (b).

A. Roman Theory. The Roman Jurists recognised two degrees of possession, the lower they described as "in possessione esse," and the higher as "possessio" properly so called. By modern civilians the lower degree of possession is called "Detentio" and the higher degree, "Possessio." Now, in Roman Law the higher degree of possession alone was protected by possessory interdicts.[5] The question arises why was not detentio also similarly protected?

(i) Savigny's Theory. B.L. 09 (a) 13 (b), 15 (b).

(i) Savigny's theory. According to Savigny the reason is the difference in the intention of the possessor in detentio and possessio. He says the Romans recognised two degrees of control over an object. According to him detentio exists, when the intention to dispose of the object is limited by a distinct recognition of the outstanding right of another, and this equally so whether the holder be a slave, usufructuary or bailee. "But 'Possessio" exists when there is on the part of the holder the "animus domini" or intention to exercise the thing as owner. This happens when the holder believes himself to be the rightful owner of the object, or having found it means to keep it subject to the possibility of the owner making his appearance or having stolen it means to keep it against

Detentio and possessio.

5 *Possessory interdicts.* These were summary processes of Roman law whereby the Praetor could maintain one party in possession or restore another to possession pending an enquiry in the usual course of law.

all comers; and in these cases only the possession was protected by interdicts in Roman Law. But Savigny's theory is open to the objection, that interdicts were allowed to the 'emphyteuta,' the pledge-holder and some other persons, to whom no animus domini or intention of the higher degree could be attributed; and to this objection Savigny's reply was that the Roman Law did recognise derivative possession in such cases.

(ii) Ihering's Theory. B.L. 09 (*a*) 13 (*b*), 15 (*b*).

(ii) **Ihering's theory**. Ihering attacked Savigny's theroy. According to him the difference between detention and interdict possession has nothing to do with the will; whoever so far exerts his will over an object as to obtain detention of it, possesses it for all purposes *except in so far as possession is denied to him by special rule of law*. So according to Professor Von Ihering both in detentio and in possessio there is such possession as would be protected by possessory interdicts. But in Roman Law possessory remedies were not granted to borrowers, lessees, etc. Ihering explains this by saying that possessory remedies were not granted in such cases because of certain special rules. And as Savigny was forced to invent the theory of "Derivative possession" to explain the application of Interdicts to Emphyteuta and so forth, Ihering was forced to plead special rules of law to explain away the denial of possessory remedies to the borower, lessee, etc.

But Ihering[6] does not deny that different degrees of contact are necessary to constitute possession in the cases of different kinds of things; thus the purchaser of cut timber allowing it to lie in the jungle may be held to have possession of the same but if his watch is found in the same place it will be treated as lost property out of his possession.

B. Teutonic Theory. The jurists of the Teutonic races seem never to have troubled themselves about the difference between Detentio and Possessio and granted possessory remedies to those, who, in Roman Law, could never have profitted by the Interdicts. Under the Salic law, the person from whose custody cattle was stolen seems to have been the only person entitled to have the thing restored to him.

B. Teutonic Theory. B.L. 09 (*a*) 13 (*b*), 15 (*b*)

C. English Theory. The English Common Law, as Mr Holmes has shown, is similar to the Teutonic Law. Possession is indeed denied to servant. But with this single exception, which in fact is a surviving relic of the ancient law of slavery, the common law makes no distinction between detention and possession and grants possessory remedies to those to whom no animus domini can be attributed.[7]

C. English Theory. Its similarity to English Common Law. B.L. 09 (*a*) 13 (*b*), 15 (*b*)

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6 Professor Holland does not agree with Ihering in his view that in Roman Law possession was protected as the actuality of ownership or as being to ownership what an outwork is to a fortress.'

7 Savigny regarded rights of possession as a department of obligations arising from wrong. Professor Holland classes possession amongst jura in re or real rights.

Plurality of Possession

Plurality of possession. It is said to be a fundamental principle of possession that only one person can be in possession of the same thing at the same time This, as Salmond points out, is true in the sense that two hostile claimants cannot both have possession at once. But when the claims are not adverse, duplicate possession is possible—e g , owners in common may both be in possession of the same thing. Hence—

Duplicate possession is possible *i f*,

(1) Mediate and immediate Possession

(1) *Mediate and immediate possession*, Mediate and immediate possession may coexist in respect of the same thing Thus a landlord by letting a house to a tenant may retain mediate possession while immediate possession is vested in the tenant

(2) Joint Possession

(2) *Joint possession* Two or more persons may possess the same thing in common, as they may own in common (e g , in a joint family)

(3) Corporeal and Incorporeal Possession

(3) *Corporeal and incorporeal possession* Corporeal and incorporeal possession may coexist in respect of the same material object, just as corporeal and incorporeal ownership may, e g A may possess the land, while B possesses a right of way over it

Reasons for protecting possession

Reasons for protecting possession. A variety of reasons has been suggested as to why possession should be protected The most important motive seems to be "preservation of peace." The theory that possession is protected because possessors are in most cases rightful owners, is

B L 10 (*a*) (*b*) Preservation of peace

not strictly accurate. According to Kant protection of possession has for its basis the respect that must be paid to free-will. A man who possesses a particular thing, has so far brought the thing within the scope of his free-will, and this free-will must be respected unless it is set aside by the combined free-will of the state acting through its organs. Kant.

Origin of rights of possession We have seen that the component elements necessary to constitute possession are corpus and animus. When these elements come together possession begins. Now the corporeal and the mental elements may be exercised by one and the same person or the former by an agent and the latter by his principal Th y may be both exercised by an agent Origin.

Extinction of the rights of possession The right of possession ceases with the cessation of one of the elements necessary for its constitution. The object of possession may be expressly abandoned or there may be an implied relaxation of the physical or the mental element. But once the mental element has been declared by the will it is not necessary that it should be maintained in constant activity. It will be presumed to continue so long as it is not negatived by a new act of will opposed to that by which possession was acquired. Extinction.

Infringement of the rights of possession. These rights are infringed by treaspass and con- Infringement.

version. Trespass means unlawful entry on another's goods. Conversion is wrongful dealing with property by one who assumes to act as its owner.

Quasi-possession.

Quasi possession. The term possession is properly used in connection with tangible things which are capable of physical control. But as possession does not require physical contact, it would appear that there is no reason why a right over a thing should not be the subject of possession. The term possession has therefore been extended under the name of quasi-possession to incorporeal things or rights over material things.

Relation between ownership and possession. B.L. 09 (*a*) (*b*), 14 (*a*), 15 (*b*), 17 (*b*)

Ownership: its relation to possession. We have finished our discussion of the conception of possession. Now as Ihering says, possession is the objective realisation of ownership. Historically the conception of possession is anterior to that of ownership. Possession is the *de facto* exercise of a claim, ownership is the *de jure* recognition of it. A thing is owned by me, when my claim to it is maintained by the will of the state as expressed in the law. It is possessed by me when my claim to it is maintained by my own will. Ownership is the guarantee of the law, possession is the guarantee of facts. This close relation between possession and ownership led Blackstone to hold that ownership originated in occupation. The earth and all things therein were at first general property of mankind, and anybody who occu-

Blackstone on the origin of ownership.

pied a portion acquired ownership over it. Permanent occupation would give permanent ownership. Savigny also regarded ownership as adverse possession ripened by prescription. Savigny, B. L. 24 (a).

Ownership: its definition. Ownership is the highest right over a thing. It is usually described as a plenary control over an object. The object may be tangible, *i.e.*, land, or intangible, *e. g.*, a copyright. It is defined by Austin as a right over a determinate thing indefinite in point of user unrestricted in point of disposition and unlimited in point of duration. It is an original and an independent right whereas other material rights over a thing, such as right of way, right of pasturage etc., presuppose that some other person has the ownership of the thing. Ownership defined by Austin. B.L. 09 (b).

Elements of Ownership. The various elements of ownership are variously stated in Roman law, as *utendi*, *fruendi*, *abutendi* etc. But according to Professor Holland, there are three essential attributes of ownership. They are the following:— Elements of ownership. B.L. 10 (a), (b), 11 (a), 17 (a) & 21 (b).

(1) A right to possess. Although inherent in ownership the owner may part with the right, (1) Possession.

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[8] Sir H. Maine does not agree with the view of the origin of ownership, for (1) occupancy giving title to a *res-nullius* is not a primitive conception, but a growth of a refined system of law. (2) Further Blackstone's theory involves the mistake of supposing that the individual and not the family was the unit of early society. Maine on Blackstone.

e.g., when he lets out or mortgages the the property.

(2) Enjoyment. (2) A right of enjoyment. This implies the right of user and of enjoying the profits of or accretions to the property. This right is limited by the rights of the state, *e.g.*, when the owner pays taxes, and by the rights of co-owners etc. The right of enjoyment is also restricted in the interest of public policy.

(3) Disposition. (3) A right of disposition. An owner can dispose of his property in any way he likes. But there are certain restrictions on this power, *e.g.*, transfer in fraud of creditors.

Objects of Ownership. **Objects of ownership.** In its primary sense ownership may be exercised over physical objects only. But it is said in a coventional sense that things other than physical objects may also be owned. For the purposes of our discussion, we may classify ownership under three heads, (*a*) in the strictest sense of the term physical tangible objects are alone property, *i.e.*, objects of ownership, *e.g.*, a horse. (*b*) In a secondary sense, intangible objects *e.g.*, copyrights, patent rights, etc, may be objects of ownership. (*c*) In a third and wide sense, the mass of rights belonging to a person may according to the fiction of Roman law and on the analogy of physical things be regarded as object of ownership.

(a) tangible things.

(b) intangible things.

(c) Universitates Bonorum.

Modes of acquiring ownership. B.L. 12 (b) **Modes of acquisition of ownership.** We have seen above the three classes of property which may be the objetcs of ownership. The

question is how can ownership in these properties be acquired. Now there are certain (I) special modes of acquisition of ownership of each of the three classes of property, and there are certain modes which are (II) general to all of them.

I. SPECIAL MODES OF ACQUISITION OF TANGIBLE PROPERTY. Ownership in tangible property may be acquired either (*A*) originally or (*B*) derivatively

(i) Special modes of original acquisition of tangible property with possession. *B. L.* 69 (*a*)

A. Original acquisition may take place (1) with or (2) without an act of possession.

(1) *With possession* Ownership in property may be originally acquired with possession in several ways (*a*) *by occupatio*, *i.e.* occupation, which means the appropriation of what belonged to no one, *i.e.*, *res nullius e.g.*, wild animals, etc., (*b*) *specificatio*, which means the making of a new thing out of materials, belonging to another, *e.g.*, wine from grapes; (*c*) *fructuum perceptio*, which means the rightful taking of property by a person other than the owner; and (*d*) acquisitive prescription or *usucapio*, which means the acquisition of ownership through long possession under conditions fixed by law

Occupation.

Specification.

Fructuum perceptio.

Usucapio.

(2) *Without possession* Physical property may be originally acquired without an act of possession by (*a*) *accession*[9] *e.g.*, if a tree bears

Special modes of original acquisition of

[9] Thus immovables may accede to immovables, e.g., by alluvion; movables may accede to immovables e.g., a tree becoming inseparable from the soil; lastly movables may accede to movables, e.g., embroidery to a garment.

tangible property without possession.

fruit, or a domestic animal bears offspring, the produce belongs to the owner : (*b*) *confusio* and *commixio*, which mean the mixing together of things belonging to different owners in such a way that they cannot be separated, so that the resultant object becomes the joint property of the owners.

B. Derivative acquisition.

B. **Derivative acquisition.** Derivative acquistion takes place by an alienation intervivos or by a testamentary document, or by donatio mortis causa. It is called derivative in contradistinction to original because the acquirer derives thereby the rights of a former owner.

Acquisition of intangible property.

(ii) Intangible property how acquired? Ownership in intangibl property is acquired after certain formalities prescribed by law are complied with, e.g., a trade mark may be acquired by use followed by registration

Acquisition of Universitates Bonorum.

(iii) Acquisition of complex masses of property. The aggregate of a man's rights and duties which is sometimes regarded as object of ownership is acquired by him in life through various circumstances. The whole aggregate of rights and duties of one man may devolve on another by universal succession.

General modes of acquisition.

III GENERAL MODES OF ACQUISITION. We have mentioned above the special ways in which each of the three classes of property may be acquired. As already stated there are certain general modes of acquisition of these rights. These are either voluntary, being due to act of parties, e.g., gift, will etc. or involun-

tary, being due to causes external to the parties, e.g., the decision of a court

JURA IN RE ALIENA.

Jura in re aliena.

After the general sketch of ownership it would be proper to consider some subordinate forms of proprietary rights known as *jura in re aliena*. We have already seen that many subordinate elements, which are included in the general notion, may be detached from the main rights and may exist in other persons as independent rights. When these subordinate rights are so detached, the residuary right still remains in the owner; and with regard to the owner, these other persons are entitled to what are called *jura in re aliena*. Of these subordinate rights the Roman law recognised four distinct kinds, called respectively "Servitude," "Pledge," "Superficies," and "Emphyteusis." The nomenclature with regard to the first named right has been preserved to the present day, and although the other two names have not survived both the continental and the Indian systems of law recognise certain jural relations which are governed by analogous principles. A word or two therefore might conveniently be said on each of these rights separately.

Principally of four kinds.

(1) **Servitude.** A servitude is that form of encumbrance which consists in a right to the limited use of a piece of land without the possession of it (Salmond), *e.g.*, right of way

(1) Servitude. *B. L.* 09 (a) 17 (b)

over it or a right to the passage of light across it.[10]

Their classification.

Classification of Servitudes.—Servitudes may be positive or negative, continuous or discontinuous, rural or urban, apparent or non-apparent, but the most important division is that into real and personal.

Real servitudes.

Real Servitudes. A real, praedial or appurtenant servitude is one which is not merely an encumbrance on one piece of land but is also accessory to another piece ; *e.g.*, the right of way from B's house to the high road across C's field.

Easements defined.

Real servitudes may in the language of English lawyers be said to comprise " Profits a prendre " and easements. In the former case the owner of the dominant tenement is entitled to remove certain tangible objects from the servient tenement. " Easement is a privilege that one neighbour hath of another by writing or prescription, without profit as a way or sink through his land or the like." The right of way, water, to the free access of light and air, are the most important forms of easements. Real servitudes are acquired, by grant, testament or prescription. They may terminate in consequence of a union of the ownership of the dominant and servient tenements.

10 " A servitude may be defined as a real right constituted for the exclusive advantage of definite persons or a definite piece of land, by means of which single discretionary rights of user in the property of another belong to the person entitled." Holland.

Personal servitudes.

Personal Servitude. A servitude is said to be personal or in gross, when it is not accessory to any land but is simply exercisable by one person on the property of another. Thus if A has a right to take water from B's tank, for his own convenience only and not for the convenience of any land belonging to him, his right will be a personal servitude. Personal servitudes may be imposed on movables as well as immovables.

Usus and usufructus of the Romans.

B. L. 17 (a), (b).

According to the Romans there were two grades of such rights. (a) the lower—*usus*—implied a use of the object without any advantage from the products, while (b) the higher—*usufructus*—included rights of enjoyment of the object and the products. The servitudes recognised by Roman law under the names "Habitatio" and "Operae servorum" were somewhat abnormal species of usus.

Quasi-usufruct.

Reallasten.

Licences.

The other analogous rights *viz.*, (a) Quasi-usufruct, (b) Reallasten, and (c) Licences, may also be mentioned in this connection. (a) *Quasi-usufruct* means usufruct of a perishable commodity,* the validity of which was only recognised in the later Roman law. (b) *Reallasten* is a duty attached to a piece of land of periodically performing positive acts, *e.g.*, the maintenance of dykes and sluices. (c) *Licence* passes no interest nor alters or transfers property in anything, but only makes an action lawful which without it would be unlawful.

(2) Pledge.

(2) **Pledge:**—We now pass on to pledge. Pledge has been well defined by Professor

Holland as "a right in rem given by way of accessory security to a right in personam." In the juristic sense the object of this right is the subsidiary one of securing to a creditor the satisfaction of his claim. All other jura in re aliena are enjoyed for their own sake but pledge is enjoyed to secure some other right and further a pledgee may, in the exercise of his right of sale completely extinguish the right of the owner in that thing and transfer that right to a third person; this power, the owners of other jura in re aliena cannot exercise.

Its forms.

The forms of pledge. The forms of pledge have been various in different times and in different countries:—(*a*) The rudest form was

(a) Fiducia.

the *fiducia* of the older Roman law, and the English mortgage at the present day, in which the debtor transferred the ownership in the thing to the creditor with a condition for its retransfer when the debt was paid. (*b*) Pawn or *pignus* is another form of pledge. In this the

(b) Pignus.

ownership of the object remains in the debtor, but its possession is transferred to the creditor. The creditor cannot make use of the thing nor can he exercise the power of sale without express agreement, but later on this was at least presumed. (*c*) There is another mode of

(c) Hypotheca.

creating security, called "*Hypotheca*" by the Romans, in which not merely the ownership of the thing but its possession also remain with the debtor. Hypotheca may arise by the direct application of a rule of law, by judicial decision or by agreement. In the last form it closely resembles the simple mortgage of India.

A security is transferable with the claim to which it is accessory. The right terminates with the discharge of the claim to which it is attached by being released, by creditor becoming owner of the thing, or by efflux of time if the right was limited in duration.

When there is a number of securities over one and the same property, the securities generally rank in order of time but exceptions to this rule are to be found in the law of Registration, in the superiority of legal estate or possession as in English law and so forth.

We shall now deal with the other two forms of jura in realiena—the emphyteusis and the superficies.

(3) **Emphyteusis.** Emphyteusis was a grant of a limited interest in land which was largely utilised for bringing into cultivation extensive tracts of provincial land towards the latter part of the Roman Empire. The Emphyteuta or grantee did not become owner—the grantor still remained the dominus, but the right which the grantee enjoyed—although a mere jus in realiena—was so extensive as to be hardly distinguishable from real ownership. There was perpetuity of tenure and fixity of rent, the emphyteuta could transfer his right and could bring real action to vindicate his right. On the other hand, the landlord enjoyed the rent and had also the right of re-entry under certain contingencies. (3) Emphyteusis.

(4) **Superficies.** Superficies was an analogous right and differed from emphyteusis mainly (4) Superficies.

in this respect, that while the latter represented an interest in land, the former was the term used to indicate the right which one person might acquire *quasi-dominus* over a building erected on land belonging to another and which according to the maxim of civil law, belonged to him to whom the right belonged.

We shall now finish this chapter with a brief reference to the sixth and last head of the antecedent rights in rem.

VI Immunity from fraud.

VI. Immunity from fraud. The right to immunity from fraud is infringed when the person of inherence is a consenting party to his own loss It is the right not to be induced by fraud to assent to a transaction which causes one damage. Fraud is the intentional determination of the will of another to a decision harmful to his interests, by means of a representation which is neither true nor believed to be true by the person making it. It seems not to be material that the maker of the statement should know it to be untrue, nor need the statement be addressed specifically to the person who suffers in consequence. The House of Lords has decided in Derry v. Peek that no liability for deceit can arise upon a statement made with an honest belief in its truth.

CHAPTER XI.

PRIVATE LAW: RIGHTS IN PERSONAM.

In the previous chapter, we dealt with that branch of Private Law which has reference to normal antecedent rights *in rem*. We shall now consider it in reference to normal antecedent rights *in personam*.

Meaning of normal antecedent rights in personam.

"Normal antecedent rights in personam"; its meaning. By this expression we mean those rights which inhere in persons of the ordinary type, irrespective of any wrong having been committed and which are available against definite persons. The right of a parent or guardian to control a child, the right of a beneficiary as against a trustee to recover the trust estate, the right of the salvor of a ship to recover expenses of salvage from the shipowner, the right of the public to receive justice at the hands of a public official, and the right to receive what has been contracted for legally from the contracting party are all illustrations of normal antecedent rights in personam. In each of the illustrations, the person in whom the right inheres is one of the ordinary type; that is, he suffers from no legal disabilities, and has also no special exemptions from disabilities created by law; the rights mentioned have not arisen out of any wrong-doing on the part of any person; and lastly, the right is available

against definite persons, in each case a particular child, or trustee, or shipowner or official, or contracting party.

A-Modes of creation of Normal Antecedent Rights in personam.

A. How created. These are rights existing in men of the ordinary type irrespectively of any wrong-doing, and available against definite persons, and can be created either (i) by operation of law, as clothing an individual or individuals with certain rights against definite persons who stand in a peculiar relation to the possessor of the right, *e.g.*, the relation of parent and child, or guardian and ward, or (ii) by act of party by which a person or persons enters into a contract with another with a view to create certain rights in personam as against either, or both of the contracting parties. This latter kind of rights in personam arising out of contracts is known in Roman law as obligations ex-contractu; while the former kind is known as obligations quasi ex-contractu, as arising from the operation of law on relations similar to those created by contract.

Comparison of Normal Antecedent Rights in personam and Roman obligations

Normal antecedent rights in personam and Roman 'obligations' compared. The Roman school of lawyers dealt with all rights in personam together under the comprehensive name of obligations, and included in it both antecedent and remedial rights. The five kinds of obligations mentioned by them are the five kinds of rights in personam arising respectively from (*i*) contracts (*ii*) quasi-contracts, (*iii*) delicts, and (*iv*) breach of contract. Our normal

antecedent rights in personam are those rights in personam which arise from contracts and quasi-contracts, and hence, they are only two species of obligations above described, by which one person is bound to perform some act for the benefit of another.

A classification of Normal Antecedent rights in personam.

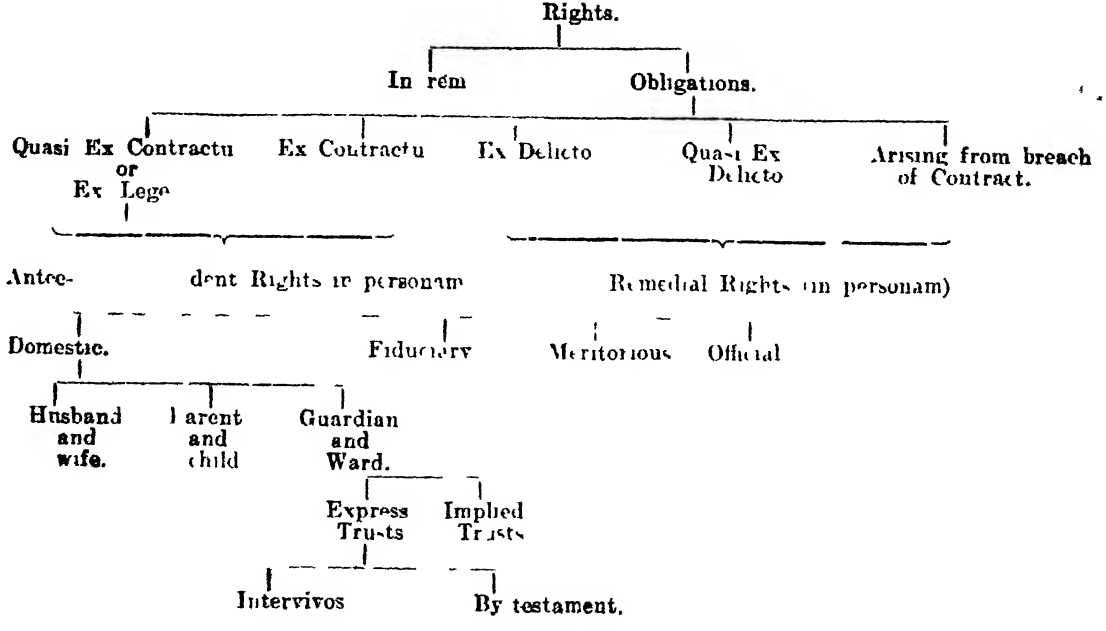
A classification of normal antecedent rights inpersonam: We have considered the nature, and the modes of creation of normal antecedent rights in personam. We shall now deal with the various kinds of those rights dividing them into two broad classes according to the mode of creation, viz., into (i) those arising by virtue of law (quasi-contractual also called by Professor Holland ex lege), and (ii) those arising from contract (contractual), and then pointing out their subdivisions and characteristics in their proper places. These divisions and subdivisions of antecedent rights in personam, as also their relation to Roman obligations will clearly appear from the table given on the next page.

I. Those arising by virtue of law.

I. Those arising by virtue of law ; (quasi-contractual or Ex Lege) : Under this head come those rights in personam which the law attaches to certain special relations, between the parties which are :—(i) Domestic relationship, (ii) Fiduciary relationship, (iii) Relation by meritorious services and (iv) Official relationship.

(i) Domestic rights.

(i) DOMESTIC RIGHTS. The domestic rights arise out of law and are available to one member of the family against another member. They are vague in character and generally con-


Rights.
In rem
Obligations.
Quasi Ex Contractu or Ex Lege
Ex Contractu
Ex Delicto
Quasi Ex Delicto
Arising from breach of Contract.
Antecedent Rights in personam
Remedial Rights (in personam)
Domestic.
Fiduciary
Meritorious
Official
Husband and wife.
Parent and child
Guardian and Ward.
Express Trusts
Implied Trusts
Intervivos
By testament.

exist in life-long courses of conduct. The several kinds of domestic rights are mentioned below.

(a) *Husband and wife.* Each has a right to the society of the other, which can be enforced by a suit for restitution of conjugal rights. In case of misconduct, the party aggrieved is entitled to divorce or separation according to the nature of the offence. (a) Husband and wife.

Although marriage is a contract in most systems of law, yet the rights attaching to the contracting paries are created by operation of law, and cannot be added in or altered by the terms of the contract. When the marriage contract is completed a status is produced and the resulting rights are the creation of law.

(b) *Parent and child.* The parent has some right of personal control, and either of them has the right of succession to the other on his death under certain circumstances. (b) Parent and child.

(c) *Guardian and ward* The guardian has some right of control and management over the ward's person and property respectively. (c) Guardian and ward.

(ii) FIDUCIARY RIGHTS. The quasi-contractual fiduciary rights in personam arise out of trusts.[1] The cestui que trust has a right in personam against the trustee. A conveys property to B upon trust that B will divide the property (ii) Fiduciary rights.

[1] Trust. When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee. Maitland.

amongst the grand-sons of A ; B is the trustee. A's grandsons are cestui que trust or beneficiaries, and they have got quasi-contractual rights against the trustee. There is no contract between them and the right is quasi-contractual or ex lege, that is to say, it arises by operation of law.

(A) Express trusts.

A. Express trusts. Trusts are either express or implied. According to English law trusts may be created inter-vivos or by will. Express trusts are those in which the owner of property expressly confides it with somebody with a clear direction as to the person to be benefited thereby.

Origin of trusts.

Origin of trusts : Both in Roman and English Law trusts originated with a view to evade existing rules, and thereby to benefit persons prevented by law from directly getting that benefit. In Roman law, it was in the form of requests to the heir or legatee to hand over the inheritance or legacy to some one else, specially foreigners, to whom no direct bequest would be valid. In English law, lands were granted to persons to hold to the use of the monasteries to whom, by the Statutes of Mortmain, lands could not be transferred.

History of English trusts.

History of English Trusts : A statute (15 Rich II C. 5) put a stop to uses in favour of monasteries ; but the advantages of a use led to other uses largely prevailing, in as much as the person to whose use the property was bequeathed was the equitable owner, and enjoyed all the benefits of the use without being liable

for the holding of land, as it was the trustee, and not he, who was the owner at law. This led to the passing of the Statute of Uses (27 Hen VIII C. 10) making the equitable owner the legal owner. But this enactment did not interfere with trusts of personal property, and trusts where the trustee had some active duties to perform. Besides it was decided in law courts that the enactment did not interfere with the equitable rights of one which had a use upon a use (Tyrell's case). Later on, with the growing change of the spirit of the people, all trusts came to be recognised by law as valid.

B. Implied Trusts. In many cases, a trust relation is implied by law. Thus (a) when a person has agreed to buy land and has paid the purchase money, but has not received a conveyance, the vendor will be regarded as a trustee for the purchaser ; (b) so also where property is purchased by one in the name of another the latter is a trustee for the former ; (c) where money has been paid by mistake the payee is a trustee for the payer. (B) Implied trusts.

(iii) RELATION BY MERITORIOUS SERVICES : The following persons, independently of any contract, are by law, entitled to remuneration for service from the recepients of the service : (a) A volunteer rendering necessary service to property or business in the absence of the owner, who is called a negotiorum gester ; (b) salvors of ships in distress, and re-captors of ships captured by the enemy ; (c) person supplying ne- (iii) Relation by meritorious services.

cessaries (food, and clothing especially) to lunatics or drunken persons.

(iv) Official rights. *B.L.* 16 (*a*).

(iv) OFFICIAL RELATIONSHIP. It is the right of every body against a public official that the latter must exercise his functions on his behalf according to law. It is enforceable against all ministerial officers of the state innkeepers, common carriers, by the crew of a ship against her owner for want of medicine, by Railway Companies with respect to the owners of the land which the Railway requires.

II. Those arising from contract.

II. Rights arising from Contract: Ex Contractu. In its wider sense, a contract is an agreement between two or more persons by

Meaning of contract.

which a right is created in either or both. It includes the creation both of a right in rem, *e.g.*, purchase and sale for ready money, marriage etc., as well as of a right in personam, *e.g.*, where either or both agree to do something for the other at a future time. The latter kind of contracts creates outstanding obligations. It is with contracts of the latter sort, that we are concerned in this chapter. Hence in

Savigny's definition.

the narrower sense, a contract is an expression of agreement entered into by several persons by which rights in personam are created, available against one or more of them. According to Savigny, 'contract is the union of several, in an accordant expression of will, with the object of creating an obligation between them.'

Anson's definition

Sir Willian Anson defines a contract as an agreement enforceable at law, made between two or more persons by which rights are ac-

quired by one or more, to acts or forbearances on the part of the other or others. So according to him, contract is such an agreement as creates an obligation, and he defines agreement as the expression, by two or more persons of a common intention to affect their legal relations.

Holmes' theory: *Contract is the taking of a risk.* Mr. Justice Holmes regards contract as the taking of a risk. According to him the important significance of a binding promise is that the promisor contemplates his being compelled to pay damages to the promisee in case of a breach by him. But this view may be objected to on the ground that it is going too far to suppose that men think of breaking their promises rather than performing them. So Holmes' definition gives a partial account of the idea involved in a contract.

Holmes' theory : Contract is the taking of a risk. *B. L.* 13 (*a*) & (*b*).

Analysis of Contract. Savigny analyses a contract into (i) several parties, (ii) an agreement of their wills, (iii) a mutual communication of this agreement, and (iv) an intention to create a legal relation between the parties.

Savigny's analysis of a contract. *B. L.* 08 (*b*) 12 (*b*), 21 (*a*).

The Subjective theory of Contract The second element above mentioned, has given rise to much controversy. The question is, is a consensus of wills really necessary?

Theories of contract. *B. L.* 10 (*a*), 13 (*b*). Subjective theory.

There are two views as to the meaning of the expression, " an agreement of their wills." or "meeting of the minds" as Prof. Miraglia puts it. Savigny, the great exponent of the subjective theory, puts it as " a union of several wills into a single whole and undivided will." According to this theory, therefore, there cannot be a con-

B. L. 16 (*a*).

tract unless the minds of the contracting parties are really the same.

Objective theory of contract. *B. L.* 11 (*a*), 13 (*a*), (*b*), 14 (*a*), (*b*), 15 (*a*), & 21 (*a*).

The objective theory. But Savigny's view has been dissented from by the advocates of what is called the objective theory. According to them the real agreement of the minds of the contracting parties is not within the province of Law. Law looks not merely at the will itself, but at the will as manifested in action. The objective theory is the better of the two, and is supported by eminent English jurists * Blackburn J. said in Smith *v.* Hughes, L. R. 6 Q. B. D. 607,—" If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party on that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

As e.g. Prof. Miraglia says " the consent is the meeting of two minds or the agreement in the 'idem placitum'. This meeting is not blind temporal coincidence, but rather their interpenetration not possible without conscious effort. The minds unite only in the consciousness of the persons who wish to make them unite, and manifest this desire by definite acts " Comparative Legal Philosophy (The Modern Legal Philosophy Series III) p. 574.

There are some German jurists however (*e.g.* schlossmann, Bähr and others) who hold an extreme objective view and base the validity of contracts entirely on the words of the contractors. They say that we are not to look into will at all but to visible and audible

The objective theory is further supported by the rules as to (1) contract by post, (2) agency, and (3) the doctrine of mistake.

1. Contract by post.

1. *Contracts by post*—Here the question whether or not the contract is made depends not on the coincidence of the wills of the parties, but on the fact of their having exchanged expressions of intention.

2. Law of agency.

2. *Law of Agency*—The liability of the principal continues, not merely so long as he continues mentally to empower his agent to act for him, but also, so long as he has not, to other's knowledge revoked his agent's authority.

3. Mistake.

3. *Doctrine of mistake*.—According to English law, certain contracts are vitiated by mistake. And this circumstance of contracts being vitiated by mistake or what is known as 'essential error' is put forward by the subjective theorists as the strongest ground in support of their theory. But Prof. Holland argues that this circumstance also can easily be ac-

B. L. 16 (*a*).

signs. But this view, like that of Savigny, is also untenable, for "it would be strange if the parties, in entering into relations with each other, only produce sound waves or come together only in such a way as to perceive light waves in place of understanding one another and of agreeing and creating rights and duties. It is clear they can move, speak or write, but this movement, words or gestures are means or signs of their thought and will, through which the transmission of rights is made and understood" Miraglia.

counted for in other ways, and the doctorine of mistake will not be inconsistent with the objective theory he upholds. Thus he says that " even here the failure of the contract is due not to the psychological fact of mistaken belief but to other causes which may be reduced to two :

Application of the doctrine of mistake.

In the first place, the language employed in the contract may be ambiguous or meaningless. Thus in Raffles v. Wichelhaus (2 H. & C. 906) defendant agreed to buy from the plaintiff cotton to arrive by ship named Peerless from Bombay. Two ships answered the description equally well It was held that the contract failed for ambiguity, similarly a contract may fail being meaningless, from referring to a non-existent object, e.g., sale of corn supposed to be on its homeward voyage, but really sold off on the way; Couturier v Hastie.—H. L. 673.

In the second place, a contract may fail where the intention of the mistaken party is known to the other party Thus A, who is an old customer of firm B sent order to the firm not knowing that the firm had changed hands. The new owner of the firm executed the reader without intimating the change. It was held that he could not recover the price. Boulton v. Jones (2 H. and N 564)

Elements of a contract. B. L. 12 (b) 15 (b).

ELEMENTS OF A CONTRACT According to Professor Holland the elements of a contract are : (A) Several parties capable of contracting, (B) a bilateral act by which they express their agreement, (C) a matter agreed upon which is (a) possible, (b) lawful, (c) of a nature to produce a result legally binding, and affecting the relations of the parties to each other and (D) very generally, either a solemn form or some fact which affords a motive for the agreement. We shall consider each of these separately.

(A) The parties. There must be at least two parties, the promisor and the promisee, and they must be capable of contracting. Sometimes the offer may be to an unascertained member of the community, *e.g.*, the finder of a lost article. (A) The parties.

(B) The bilateral act: offer and acceptance. The agreement can be expressed by the offer by one party and the acceptance of that offer by another. The following are the rules governing offer and acceptance. (B) Offer and acceptance.

Rules governing offer and acceptance.

"(*a*) *The acceptance must unconditionally correspond with the offer.*

(*b*) *The acceptance must be contemporaneous with the offer*, which may therefore be withdrawn at any time before it has been accepted.

The following rules deal with some of the difficulties that arise in this connection.

(1) The offer remains open only for a reasonable time. Ramsgate Hotel Co. v. Montefire. (2) The death of the offeror revokes the offer (in English law). Dickinson v. Dodds. (3) The acceptance may be completed on acting according to the offer without communicating the acceptance. Carlill v. Carbolic Smoke Ball Co. (4) An offer is irrevocable after it has been accepted, which in the case of contracts by correspondence may be sufficiently made by posting a letter containing it (Brogden v. Metropolitan Railway Co.), although this letter be delayed (Adams v. Lindsell), or even fail altogether to reach its destination (Dunlop v. Higgins; Household Fire Insurance Co. v. Grant). (5) A revocation of an offer despatched before, but reaching the acceptor after the posting of the acceptance comes too late (Byrne v. Van Tienhoven; Henthorn v. Fraser). (6) A revoca-

tion of an acceptance, posted after, but reaching the proposer simultaneously with the acceptance probably prevents the formation of the contract (Dunmore v. Alexander).

(c) *Fraud, undue influence and duress* on the part of either party, are circumstances each of which operates as a flaw in the formation of a contract and renders it voidable at the option of the other party.

(1) Fraud

(1) Fraud consists in the making of an intentional mis-representation or concealment in order to induce another to act up to it which the latter does, and to his disadvantage. Innocent misrepresentation as inducing one into a contract also makes it voidable and specially unenforceable. Redgrave v. Hurd.

(2) Undue influence.

(2) Undue Influence consists in acts, which though not fraudulent, amount to an abuse of the power which circumstances have given to the will of an individual over another Such influence is presumed in certain relations, e.g., those between a solicitor and his client, a parent and his child, etc. It makes the contract voidable.

(3) Duress.

(3) Duress consists in actual threatened violence to the person, and not merely to the property, of an individual. It makes the contract voidable.

Mode of expression.

(d) *The agreement may be expressed in writing, word, or by signs, or merely by a course of conduct*, in which last case, it is called an " implied contract "; and it may be between the persons or their agents.

The proposal and acceptance may be made by the parties or their agents. *Qui facit per alium facit per se*, he who does anything by another, does it by himself.

Authority of agent. The act of the agent is the act of the principal for everything done within the scope of his authority. The authority may be ex-

pressed, as when it is given by words spoken or written or implied when it is to be inferred from the circumstances of the case. Where the person professing to act as agent had no such authority, he may be retrospectively made the agent of the principal by his subsequent ratification. The agent may renounce his authority or the principal may revoke it. The authority is terminated by the business of agency ceasing or being completed, and by the death or bankruptcy of the principal.

C. Subject-matter of agreement.

(C) Subject-matter of the agreement. The matter agreed upon must be, at the time of the agreement, both possible and legally permissible. A thing may be impossible either naturally or being practically out of the question, e.g., recovering a ring from the sea. The matter contracted must not be against public policy. Thus a marriage brokage contract is void. The agreement, again, must have been intended to produce a legally binding result. Thus the agreement between two judges as to the result of a case is not a contract.

It is also necessary that in order to be a valid contract between the parties, the legally binding result of their agreements should affect their own legal relations; thereby differing from an agreement of a number of jurors in a case, where the result of that agreement affects the legal relation, not of themselves, but of the persons tried before them.

D. Form and consideration.

(D)...Form and Consideration. Lastly, a contract must generally be either in some prescribed form, or as the result of some underlying cause (called consideration in English law.)

(1) Form.

(1) *Form*: Formal Contracts. By form is meant some peculiar solemnity attaching to the

expression of agreement, which of itself gives efficacy to the contract. Some hold that in the history of law, informal contracts preceded formal ones. Others, with still stronger evidence, say that out of the complexity of form of early times has grown up the simple contract. In Roman, as well as in English law during the early part of the history, form was the most important element of a contract. The solemnity of the form is looked upon as conclusive evidence of the seriousness of intention of the parties.

Advantages of form. (a) It prevents the bargain from being rashly struck. (b) It facilitates the proof of what has occured.

The formal contract of Rome was 'stipulatio,' of France—writing under seal and of England—'deed.'

(2) Consideration.

(2) *Informal Contracts. Consideration.* Besides the formal contract of stipulatio, the Romans recognised eight informal contracts. Four of these, *viz.*, loan for consumption, loan for use, deposit, and pledge were accompanied by bailment. The other four were sale, hire, agency and partnership.

All these were accompanied by a 'cause,' which, though often consisting in part-performance, was in effect only the mark by which an arbitrarily defined class of agreements was distinguishable. According to later Dutch and French commentators 'causa' signifies nothing more than a reasonable and permissible ground for the consent of the parties. In England, 'causa' came to be equivalent to consideration.

Definition of 'consideration.'

A consideration is "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour detriment or inconvenience sustained by the plaintiff however small the detriment or inconvenience may be, if such act is performed, or inconvenience suffered by the plaintiff with the assent, express or implied, of the defendant, or, in the language of pleading, at the special instance or request of the defendant" Per Tindall J. in Laythorp v Bryant

Past consideration is no consideration.

Past consideration is no consideration. It is not necessary for the validity of an informal [illegible] the consideration for a promise should be adequate (Coggs v. Barnard); but the consideration must have some value. What may be quite an adequate consideration for one man, may appear inadequate to another, and it is sufficient if there is some value in the consideration

A promise to perform an already existing legal duty has no value because the promisee in the case derives no greater benefit by the promise than he had before it by virtue of the legality of the past duty; and hence such a promise is no consideration for an agreement on the part of the other side. The consideration must either be present or future; and past consideration, although possibly a motive for a promise, is no legal consideration for it, so as to enable the promisor to enforce it, except in certain special circumstances authorised by law. Lampleigh v. Braithwait.

Modes of strengthening a contract.

Modes of strengthening a contract—Besides supernatural means, *e.g.*, oaths, etc., adopted to strengthen a contract, there are some legal modes of doing so. They are (i) guarantee, for the performance of the contract, given by third persons, and (ii) property kept as security for it.

Effect of a contract.

Effect of a contract. The effect of a duly made contract is the creation of rights in parties to the contract which vary with the nature of the contract.

Principles of classification of contracts.

Principles of Classification of Contracts: There are various ways of classifying contracts. Contracts may be (1) *Joint or Several*, according to the number of parties on either side; (2) *Unilateral* or *Bilateral*, according as one or both parties are bound by it; (3) *Formal* or *Informal* according as solemnities are required for its validity, or not; (4) *Principal* or *Accessory*, according as they are entered into for their own sake, or for the fulfilment of another contract; (5) *Gratuitous*, or *Onerous*, according as they are entered into for love or gain; (6) *Real* or *Consensual* according as they require bailment or mere consent for validity; (7) *Aleatory* or *not so*, according as they depend on an uncertain event or not; (8) *Conditional* or *Unconditional* according as they are dependent on a condition or not; and (9) *Exchange, rendering services*, etc. according to the nature of the benefit promised.

Holland. Professor Holland classifies contracts mainly into "principal" and accessory each of which may be further subdivided. A principal contract is one entered

into without an ulterior object; an accessory contract is one which is made for the better carrying out of a principal contract

Principal contracts.

Principal contracts may be for.—1—Alienation; 2. Permissive use; 3. Marriage; 4. Service; 5. Negative service; and 6. Aleatory gain.

Accessory contracts.

Accessory contracts are—1 Suretyship: 2 Indemnity; 3. Pledge; 4. Warranty; 5. Ratification; 6. Account stated and 7. For further assurance. We shall now deal with them in detail.

(1) For Alienation

B. L. 16 (a).

Principal Contracts. (1) For alienation. A contract for alienation may be either a gift or an exchange, *i.e.*, it may be an act of liberality of one party or it may be intended to secure some benefit for both the parties.

Gift.

Gift. In contracts for gift or liberalities only one party is bound. They are enforceable in certain defined cases, *e.g.*, in Engilsh law, when they are entered into by deed, in France before a notary, and in Roman law when they are registered. Certain formalities are necessary and gifts are generally voidable, if creditors be cheated.

Exchange.

Exchange. By a contract of exchange both parties are bound. Its earliest form is Barter—an exchange of one commodity for another. Then came sale agreements. Special formalities are required for the sale of certain things. After agreement for sale of movables is complete, the vendor's lien, and his right of stoppage in transit are recognised. The right of lien is a right to retain possession of the article

till the price is paid, and the right of stoppage in transit is a right to avoid a contract on hearing the insolvency of a buyer, while the goods are in course of transit to him, but not actually delivered to him. In Roman and French law, in every sale, the vendor impliedly warrants the title. In England, however, the purchaser is to take care of himself, the maxim being *caveat emptor* (beware purchaser). But English law recognises certain exceptions to this rule.

(2) For permissive use.

(2) **For permissive use.** Contracts for permissive use are, (a) loan for consumption (mutuum), (b) loan for use (commodatum) and (c) hire (locatio-conductio).

(a) Loan for consumption

(*a*) *Loan for consumption.* It takes place when money or things are gratuitously given to a man on the understanding that he shall, on a future day, return to the giver not necessarily the things themselves, but their equivalent in kind. No interest is payable under this contract unless expressly provided.

(b) Loan for use.

(*b*) *Loan for use.* Loan for use is also gratuitous. The borrower uses the thing lent and is bound to return it and though not liable for wear and tear, is expected to take such care as would be taken by a diligent person.

(c) Hire.

(*c*) *Hire.* In hire, unlike in loan for use, the hirer pays rent, and thus the contract is for the benefit of both the parties. The hirer is not bound to take as much care as a borrower.

(3) Marriage.

(3) Marriage. A completed marriage creates a status and gives rise to a right in rem. An agreement to marry gives rise to a right in per-

sonam and an action for damage will lie on a breach of such agreement.

(4) For services. According to Prof. Holland, the more important contracts for services are (a) for care-taking, (b) for doing work on materials, (c) for carriage, (d) for professional or domestic services, (e) for agency, and (f) for partnership. Each of these contracts may be either gratuitous or for reward. (4) For services.

(a) Care-taking.

(*a*) *Care-taking.* When care-taking of an object is gratuitous it is called a deposit, which is a bailment of goods to be kept by the bailee without remuneration. Such deposit may be made pending the decision of a dispute or out of necessity, e.g., to save from fire. Care-taking for remuneration is found in the case of innkeepers, warehousemen and others.

(b) For doing work on materials.

(*b*) *For doing work on materials* If work is done on materials gratuitously, the worker may be made responsible for gross negligence only, but if his work be for remuneration, a high degree of care is expected

(c) For carriage.

(*c*) *For Carriage*—of goods or persons. A gratuitous carrier is in the same position as a gratuitous care-taker. A carrier of goods for reward by land is bound to take goods so long as he has got space, and he warrants safe and secure carriage. A carrier of goods by sea is governed by prescribed rules.

(d) For professional service.

(*d*) *For professional services.* The professions of advocates, teachers of law or grammar, philosophers, surveyors, etc., were considered as too liberal by the Romans to admit of suits for fees. In English law, barristers have the

same disadvantages. Professional service, if gratuitous, is not culpable for negligence; but if it is for reward, skilfulness and competence are guaranteed, and remuneration cannot be recovered in case of unskilfulness.

Domestic servants are similarly regulated by the ordinary rules ; but servants of large companies have special rules for them created by law.

(e) Agency.

(e) *Agency*. The relation between an agent and his principal is governed by a contract for service. An agency is seen only in advanced systems of law. In old Roman law, a man could be represented only by persons under his power, *e.g.*, slave and others. Later on strangers as gratuitous agents were recognised. The agent was bound to show the utmost care and was indemnified against liability or expenses of the work. Later on, development of business led to a recognition of agency to a great extent. A reasonable remuneration was granted to the agent. Under the modern English law, the agent is bound to manage his principal's business with care as a rule, not to delegate the management to another : *delegatus non potest delegare*....The principal is bound to indemnify the agent against expenses and personal liability. (For causes terminating an agency see p. 151).

Kinds of agents.

Kinds of agents : general and special agents. Agents are said to be ' general ' when their authority is defined by the character of the business, as in the case of factors, brokers or

partners; or 'special' when their authority is limited by the terms of appointment.

(f) *For partnership.* Partnership is an agreement between several persons by which they unite for the purpose of carrying on business in common, with the aid of joint funds, joint labour or both. Usually, each partner is agent for all the rest. It may be for life, or a definite time. (f) For partnership.

Termination of partnership. It is terminated by—(1) mutual consent, (2) retirement of one partner; (3) efflux of time, (4) death or bankruptcy of any of them, (5) one partner instituting a suit against the rest, etc. Its termination.

There are three classes of partnerships—of limited liability, of unlimited liability and a mixture of both. In a partnership of limited liability, the responsibility of a partner is limited to his share in the business but in a partnership of unlimited liability, the partner is also personally responsible for the debts of the partnership

(5) For negative service. A contract for negative service is one in which one party promises to abstain from certain acts. Unless the restriction is unreasonable or against public policy, the tendency of recent cases is to uphold it. But contracts which impose unreasonable restriction are held invalid as interfering with personal freedom. Thus a contract in restraint of trade is void, if it is unreasonable. The leading case on the subject is Maxim-Nordenfeldt Gun Co. v. Nordenfeldt. So also (5) For negative service.

a contract not to marry a person is good, but one in general restraint of marriage is void.

(6) For aleatory gain.

(6) For aleatory gain. A contract for aleatory gain is one, "the effects of which as to both profit and loss, whether for all the parties or for one or several of them, depend on an uncertain event." They may be of various kinds. Some of them are discussed below

B. L. 08 (*b*).

(a) Bets and stakes are, as a rule, not enforced under modern system of law Both English and French law make some exceptions for plates, prizes, sports, and exercise. (b) Lotteries are illegal in England. (c) Stock-jobbing was once made void and illegal in England; it is not so now. (d) An agreement to pay annuities is legal except in special cases. (e) Loan to a shipowner to be repaid on return is valid. (f) Insurance is a contract by which one party, in consideration of a premium engages to indemnify another against a contingent loss. by making him liable for a payment in compensation, if, or when, the event shall happen by which the loss is to accrue Martime Insurance is the oldest form of insurance, as having been recognised as early as the time of Elizabeth by a statute (43 Eliz. C. 12) Then came fire and life insurance. Life insurance differs from marine insurance in an important respect. In a life insurance the contract is to pay certain compensation in case of death due to illness or accident. Fire and other insurance of the kind is a contract to pay on an event which may or may not happen. but in the case of life insurance, the event must happen sooner or later.

Accessory Contracts. Some contracts are made with the object of creating certain rights which are merely ancillary to another right. Accessory contracts are the following:—(1) suretyship or guarantee; (2) indemnity; (3) security which may be (a) mortgage, (b) pledge, (c) lien, (d) or hypothec; (4) warranty; (5) ratification; (6) account stated; (7) for further assurance. II. Accessory contracts. *B. L.* 16 (a).

(1) *Suretyship*: It is a collateral contract to perform the promise or discharge the liability of a third person in case of his default. The person who makes this promise or gives this guarantee is called the surety. The liability of the surety cannot exceed that of the principal debtor. (a) As between surety and creditor—certain acts of the creditor discharge the surety. (b) As between surety and debtor—the surety is entitled to certain remedies of the creditor against the debtor. (c) As between several sureties—one surety discharging the debt is entitled to contribution from the other sureties. (1) Suretyship.

Termination of surety's liability. The surety's liability terminates by a discharge either (i) of the principal obligation, *i.e.*, the debt, by the debtor, or (ii) of the guarantee by one of his co-sureties.

(2) *Indemnity*. It is a promise to indemnify or save harmless the promisee from consequences of acts done by him at the instance of the promisor. It may be either express or implied. Marine and fire insurance are instances of contracts of indemnity. (2) Indemnity.

(3) Security

(3) *Security.* Contracts of security are accessory contracts whereby debts are created. Mortgages and pledges are the most important of the contracts of security. In a mortgage an interest in immovable property is conditionally transferred as security for the repayment of a loan. A *pledge* is the delivery of a thing to a creditor as a security for money due, on condition that he will return it to the debtor on his paying the debt. The debtor is also entitled to the expenses of keeping it, and also to exercise a power of sale if the debt should not be paid.

(4) Warranty: its nature.

(4) *Warranty.* It is an express or implied statement of something which the party undertakes, shall be part of the contract, and though part of the contract, collateral to the express object of it. It is a term added to a contract. It is not so intimately connected with a contract as to be a condition precedent to the contract coming into operation.

(5) Ratification.

(5) *Ratification.* Ratification is the "adoption by a person as binding upon himself of an act previously done by him, but not so as to be productive of a subsisting legal obligation, or done by a stranger, having at the time no authority to act as his agent." If a person professing to act as agent was not authorised to act for the person whom he professed to represent, he may be retrospectively made the agent of that person by subsequent ratification.

(6) Account stated.

(6) *Account stated.* An account stated is also an accessory contract, for it is superadded to a pre-existing contract giving rise to a debt. It is an admission by one that upon accounts

being taken between him and another, with whom he has an account, a balance has been found due by him to that other person.

(7) *Further assurance.* Agreements for further assurance are often found in conveyances of land and in other instruments. Such agreements are accessory to the main contract to which they are attached. (7) Further assurance.

B. Transfer of normal antecedent rights in personam. We shall now consider how normal antecedent rights in personam are transferred, e.g., they may be transferred by act of law or act of party. B. Transfe

(i) Transfer by operation of law. Rights in personam and also the corresponding liabilities may be transferred by operation of law e.g., death, bankruptcy, etc. So on the death of a man, his rights and liabilities pass to his legal representatives; on his bankruptcy to the trustee in bankruptcy. But rights and liabilities which arise from family relations or which depend upon the personal skill of either party are not transferable by operation of law (i) Transfer by act of law.

(ii) Transfer by act of party. The power to transfer rights in personam by acts of party is subject to important restrictions. At present assignments of choses in action are allowed. Certain kinds of contractual rights have been made assignable by statutes, e.g., rights arising from Marine and Life Insurance Policies, Bailbonds etc. In all these cases, the assignee takes subject to all defences that would be available against the assignor. In case of (ii) Transfer by act of party.

one class of instruments, *viz.*, negotiable instruments, e.g., Bills of Exchange, Promissory notes etc., a bona-fide assignee for value is not affected by defects in the title of the assignor or successive assignors. Negotiable instruments pass by delivery or endorsement without notice to the debtor.

History of the right.

History of the evolution of this right. Old Roman law refused the transfer of rights and liabilities under a contract e.g., the right to a debt. Later on it indirectly gave its recognition to such transfers by holding, on the suit of a stranger to such a transfer or assignment, that the assignor was a trustee for the assignee, or that the assignor had constituted the assignee his agent for the purpose of bringing actions. Early English law also similarly refused to recognise transfer of choses in action (that is, right under contract like the right to a debt.) Later on, following the later Roman practice, the English Court of Chancery allowed the assignee who paid consideration for the assignment to sue in his own name. The Judicature Act of 1873 made assignment of rights and liabilities under a contract valid, but such an assignment is subject to all equities existing as between the promisor and the promisee.

Liabilities. Liabilities under a contract are as a rule, not assignable by act of party though there are certain covenants running with the land, which are assignable.

C. Extinction.

C. Extinction of normal antecedent rights in personam. Normal antecedent rights in

personam may be extinguished by any of the following circumstances: (*i*) *Performance;* (*ii*) *Events excusing performance;* (*iii*) *Substitutes for performance;* (*iv*) *Release of performance;* (*v*) *Non-performance.* We shall now consider these modes one by one. B. L. 21 (a)

(i) *Performance.* It is the natural mode of extinguishing such rights. Performance by third person is sometimes permissible as a mode of extinguishing these rights. (i) Performance.

(ii) *Events excusing performance.* The following rules show what events are taken as excusing performance: (a) Subsequent impossibility to do the contracted act does not excuse performance, except in the following cases: Death of the person on whose individuality the act is intimately dependent, destruction of the thing to which the performance has reference, failure in the occurence of the event, with reference to which the contract was made, and change in law or outbreak of war between the countries of the contracting parties (b) The least loss of status cancelled claims against filius familii in Roman Law. (c) Union in one person of the debtor and the creditor sometimes extinguishes the right, sometimes not. (ii) Events excusing performance.

(iii) *Substitutes for performance.* The following are some of the substitutes for performance which operate to extinguish the right: (iii) Substitutes for performance.

(a) Tender of the exact amount followed by deposit in court, extinguishes the right of the creditor against the debtor. (a) Tender.

(b) Compromise.

(b) Compromise, or part payment, and consent to give up the residue by the promisee because of some consideration extinguishes the promise.

(c) Acceptance of something new.

(c) Giving an acceptance of something other than what is due in its place, extinguishes the right. This was known in Roman law as Datio in solutum.

(d) Set-off.

(d) Two mutual claims may be mutally set off against each other so as to extinguish both.

(e) A new obligation by consent.

(e) Substitution of a new obligation for the contractual right.

(iv) Discharge by release of performance.

(iv) *Discharge by release of performance.* A contract may be extinguished by release, that is to say, by waiver of the promise. The presence of consideration must be proved for release of performance, unless the contract be one under seal.

(v) Disabling oneself or announcing non-intention to perform.

(v) *Non-performance, or disabling oneself from performance, or announcing non-intention to perform* by a party puts an end to his rights under contract.

CHAPTER XII.

Private law: Remedial Rights.

In the previous Chapters we have discussed the antecedent rights in private law. We shall deal with Remedial Rights under private law in this Chapter.

History of the law of remedies.

Primitive Remedies. In a rudely constituted society, in which the elements of a state are still in the concrete, each individual in the community is left to work out his own remedy for any wrong he may have suffered at the hands of another. The spirit of Ancient Law is a spirit of revenge, which is best expressed in the Jewish canon of "an eye for an eye, tooth for a tooth." But this system had a twofold defect: (1) the measure of his right to redress was regulated by no other standard than the injured person's own sense of the wrong infected, he being the judge in his own cause, and (2) his power to obtain redress was limited to the physical force which he was able to command.

Spirit of revenge.

Defects.

Gradual changes. *B. L.* 09 (*a*). 10 (*b*).

Gradual changes. Under the humanising influence of advancing civilization the omnipotence of self-help was subjected to one limitation after another. As Sir Henry Maine points out "the commonwealth at first interfered through its various organs rather to keep order and see fair play in quarrels than take them, as it now does always and everywhere, into its own hands." The stages of

Maine's view.

progress according to Professor Holland are these: As time went on the mode of taking compensation was substituted for the violent retaliation of the injured party. Seizure of property and of pledges was substituted for the unannounced barbarous attack of the tribe or the man. To this stage belongs the Indian custom of 'sitting dharna,' according to which the creditor fasts at the door of his debtor till his debt is paid. The next stage was the introduction of regulated self-help. Distress was resorted to but only on some special grounds, and there were some safeguards against abuse. Force might still be used to protect life and property but not in excess of actual need. In the last stage people seek and get their remedies in the law-courts. But the old notion of self help is still not completely eradicated, and even the modern law permits its exercise in certain exceptional circumstances.[1]

Stages of progress.

The kinds of remedial rights.

Now the regular and ordinary protection of a right consists in the judicial recognition of an actually existing right, which is vindicated against some violation that has either (a) already occurred, or (b) that is threatened. In the latter case, the law interferes with the view of "prevention"; in the former, with that of "redress." The remedy in the one case assumes the form of an "injunction" which is granted to prevent the breach of an obliga-

[1] See for instance, section 99—106, Indian Penal Code.

tion existing in favour of the applicant; in the other, it takes the form of an "Action" which is granted to prevent the person of inherence from losing, or the person of incidence from gaining, from the breach of an obligation which has already occurred.

The purposes of remedial rights.

This right of action is a remedial right and its object may be either restitution, *i. e.*, cancelling the effects of the wrongful act as far as possible, or compensation, *i. e.*, award to the injured of damages for wrongs which cannot be undone.

It must be remembered that remedial rights are, as a rule, available 'in personam' *i. e.*, against the wrong-doer.[2]

We shall now discuss the origin, transfer and extinction of remedial rights.

ORIGIN.

Origin of remedial rights.

I have already seen that remedial rights arise out of the infringements of antecedent rights. Now these infringements are to be classified according to the nature of the rights which they infringe. They are thus either breaches of contract or wrong independent of contract, *i.e.*, torts.

What is a tort? *D. L.* 25 (b).

Tort.—A tort or a delict is defined by Mr. Salmond as "a civil wrong, for which the remedy is an action for damages, and which is not solely a breach of contract or a breach of trust."

2 There are certain actions, *e.g.*, suits to enforce a maritime lien which are regarded as actions "in rem." But according to Professor Holland these remedial rights in rem are merely modes of execution.

How do torts differ from crimes?

B. L. 08 (b). 09 (a), (b). 10 (b), 12 (a), 13 (a). 17 (a), (b) 24 (a) & 25 (b).

Difference between crimes and torts. The distinction between 'torts' and 'crimes' is very fine. According to Blackstone, civil injuries (torts) are *private* wrongs, and concern individuals only, while crimes are *public* wrongs and affect the whole community. Now, this certainly is an important distinction between the two. But it is too vague to form the basis of a scientific definition.

Blackstone.

Austin.

Thus Austin, in criticising Blackstone, says that (a) most crimes *e.g.*, murder and theft, affect individuals, and (b) all offences (or wrongs) affect the community, and all offences affect individuals. Austin therefore gives the following definition. A civil injury (tort) is an offence which is pursued at the discretion of the injured party. A crime is an offence which is pursued by the Sovereign or his subordinates.

Holland.

Professor Holland says that a crime is the violation of a right which resides in the state or Sovereign, while a tort or civil injury is the violation of a right which resides in an individual.[3]

B. L. 10 (b). 17 (a), (b).

The same facts, however, frequently give rise to either civil or criminal proceedings, *e.g.*, in the case of libel. Thus if A sends to B a post-card describing the latter as a "liar, swindler and thief," B can either prosecute A

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3 But this view seems to differ only in words from that of Austin. For suppose that a right is infringed, how are we to know whether the person whose right is infringed is the sovereign or the individual until proceedings are taken to remedy the injury?

(in the sovereign's name) for criminal libel, or sue A for damages for tort.

Classification of wrongs. B. L. 08 (b), 09 b 13 (a), 14 (b), 15 (a) & (b). 24 (a).

Classification of wrongs. According to Professor Holland wrongful acts may be classified on five different principles:

1. According to the state of the will of the wrong-doer, which may be (a) entirely absent, as in case of innocent trespass; (b) such as exhibits intention, sometimes called 'malice.'

2. According to the state of the will of the injured party, who may (a) consent to the invasion of his rights which, therefore, is not a wrong, (b) insist upon his rights, and oppose the invasion or (c) who may be induced by fraud to consent to the invasion.

3. According to the means whereby the wrong is effected, *e.g.*, (*a*) by physical violence, (b) by words uttered, or (c) by omission to perform a contract.

4. According as some actual loss to the injured party is or is not essential to the wrongful act.

5. According to the nature of the right infringed.

Professor Holland selects the last-mentioned principle of division and gives the following tabular view of rights and the acts which are infringements thereof:—

Tabular view of rights and infringements. B. L. 09, (b), 11 (a).

A. Rights in Rem.

	Rights.	Infringements.
(1)	Rights to personal safety.	Assault or imprisonment.
(2)	Family rights in rem.	Abduction or adultery with a wife, or seduction of a servant.
(3)	Rights to good name.	Defamation.
(4)	Rights generally available.	Nuisance, malicious arrest or prosecution.
(5)	Rights of possession.	Trespass, conversion, detinue.
(6)	Rights of ownership of tangible objects.	Do.
(7)	Rights of copyright, patent-right and trade-mark.	Infringement.
(8)	Rights in re aliena.	Disturbance of an easement or conversion of a pledge
(9)	Rights to immunity from fraud.	Deceit.

B. Rights in personam.

(1)	Family rights	Subtraction, adultery, refusual of due aliment, ingratitude of a freed man, neglect of the Vassal's duties.
(2)	Fiduciary rights.	Breach of trust.
(3)	Reversionary rights.	Waste.
(4)	Meritorious rights.	Refusal of the merited reward.
(5)	Rights against officials.	Neglect to perform duty.
(6)	Rights ex contractu.	Breaches of contract.

TRANSFER.

Transfer of remedial rights

A right is generally transferable by the person of inherence, and the transferee may sue to enforce that right in his own name.

But a remedial right is not generally transferable. This remark applies with greater force to the right which arises from an act causing harm of a purely personal nature short of death, to an individual; for the right is so intimately connected with his individuality that it dies with the person. Thus we get the maxim *actio personalis moritur cum persona*. The estate of the wronged person has consequently no claim, and on the other hand, that of the wrong-doer is not liable. An action commenced in the lifetime of the wronged person for a tort will be put to an end by his death. There are however certain statutory exceptions to the rule expressed in the above-mentioned maxim

Suspension of remedial rights is not generally allowed.

The maxim 'actio personalis moritur cum persona.'

EXTINCTION.

Remedial rights may be extinguished in several ways, for instance, by (1) a formal release on the part of the person of inherence, (2) waiver, (3) set off, (4) bankruptcy, (5) merger, (6) estoppel by judgment, and (7) limitation or expiry of the time within which the law allows the remedy to be enforced

Extinction of remedial rights: *R. L.* 99 (6)

There are also cases where a remedial right is suspended and not extinguished, *e.g.*, when a court refuses to try an action which is pending in a court of concurrent jurisdiction.

causes.

CHAPTER XIII.

Private law: Abnormal.

We have so long been considering the various kinds of rights under Private Law assuming the person of inherence as well as the person of incidence to be normal persons, *i.e.*, human beings (as opposed to artificial persons) unaffected by any such peculiarity as infancy, coverture, etc. In the present chapter we shall discuss the changes that the rights undergo due to abnormity of personality.

Abnormal persons are either natural or artificial.

Now abnormal persons are either natural, *i.e.*, individual human beings, or artificial, *i.e.* aggregates of human beings, or property, treated by law as persons. We shall deal with each of these two kinds of abnormal persons in order.

I. Natural. *B. L.* 09 (a). Causes of abnormity. *B. L.* 08 (b).

1. Abonrmal natural persons. The various causes of abnormity in natural persons are :—

(1) *Sex* : Sex is a cause of disability. Thus in Hindu Law women have generally been excluded from inheritance save and except such as have been expressly enumerated as heirs.

(2) *Minority* : Minors can hold and receive property but they cannot execute a will or enter into a valid contract without the sanction of their guardian, or of the court. But the minor is bound to perform his contract so far as it is for necessaries.

(3) *Coverture* : By marriage the wife comes within the authority of the husband and this results in certain disabilities in the wife. Thus the wife cannot enter into a contract or make a will on her own behalf. Marriage effects a partnership as it were between the husband and the wife and they cannot sue each other.

(4) *Mental defects* : Mental defects are lunacy, prodigality and drunkness. Contracts entered into by lunatics are generally voidable in English Law. Persons who are declared by competent courts to be prodigals are also subject to disabilities like lunatics. Intoxication does not create a status.

(5) *Deafness and Dumbness etc.* : Deaf and dumb persons are generally excluded from inheritance under the Hindu Law.

(6) *Office* : The maxim of the English Law is that the ' King can do no wrong.' No action can be brought against him nor against certain of his representatives.

(7) *Profession* : A soldier on active service enjoys exceptional testamentary privileges. In English Law a barrister cannot sue for his fees.

(8) *Civil death* : Loss of legal rights results to a person who enters into religion or is guilty of treason or felony.

(9) *Illegitimacy* : An illegitimate child is in the eye of law a ' nullius filius ' (nobody's child) and has generally no rights of inheritance.

(10) *Non-conformity* : Religious non-conformity has been an important cause of civil

disability, e.g., in the case of the Roman Catholics.

(11) *Alienage*: Aliens were not allowed to own freehold land in England before 1870. Even now aliens are under various disabilities.

(12) *Hostility*: "The contracts of an alien enemy with a British subject made during the war are void, and his right to sue upon other causes of action is suspended during the war."

(13) *Colour and Race*: Formerly colour or race was a cause of disability in America.

(14) *Slavery*: Slavery is extinct now-a-days; but it caused almost total loss of status to the slave.

(15) *Celibacy*: Formerly celibacy was a cause of disqualification in certain systems of law.

(16) *Patria-potestas* The 'filius familius' suffered many disabilities. He could not enter into a contract; nor could he hold property excepting what was his peculium.

II. Artificial.

II. Artificial Persons: Artificial persons are created (a) by charter granted by the executive authority, and (b) by special law. They may consist either of natural persons or artificial persons or both natural as well as artificial persons.

How created?

Characteristics of artificial persons

Characteristics of artificial persons: Professor Holland mentions the following characteristics of an artificial person: (a) It is not merely the sum total of its component members but something super-added to them. (b) It may remain although they are changed one and

all. (c) The property it holds does not belong to the members either individually or collectively. (d) Its claims and liabilities are its own. (e) Its agents though appointed by the majority, do not represent them. (f) It rests only in intendment and consideration of law. (g) It has no soul. (h) Its will is that of the majority of its members. (i) It is incapable of many wrongful acts. (j) Its capacity for being the subject of rights is limited by the purposes by which its existence is recognised

The mode in which an artificial person enters into a contract is by the imposition of its seal. An act of a corporation which is in excess of its powers is *ultra vires* and therefore void.

Artificial persons classified.

According to Professor Holland artificial persons may be classified under the following heads :—

(1) Subordinately political, *e g*, municipal corporations, (2) Administrative, *e g*, Trinity House; (3) Professional, *e g*, College of Physicians; (4) Religious, *e g*, Church Missionary Society; (5) Scientific and Artistic, *e.g.*, Royal Academy, (6) Educational, *e g*, University of Oxford; (7) Eleemosynary, (relating to charity), *e.g.*, St. Thomas Hospital; and (8) Trading, *e.g.*, the East India Company

Quasi-corporations.

The holders for the time being of certain official positions, though not incorporated, are recognised in English law as quasi-corporations, *e.g.*, Church-wardens of a Parish.

Corporation aggregate and corporation sole.

Corporation aggregate.

Corporations are of two kinds, distinguished in

Corporation sole. *B. L.* 12 (*b*).

English law as corporation aggregate and corporation sole. A corporation aggregate is an incorporated *group* of co-existing persons and a corporation sole is an incorporated series of successive persons The former is that which has several members at a time, while the latter is that which has only one member at a time. Corporations aggregate are by far the more numerous and important. Examples are a registered company consisting of all the shareholders and a municipal corporation, consisting of the inhabitants of the town. Corporations sole are found only when the successive holders of some public office are incorporated so as to constitute a single, permanent and legal person. Examples are the sovereign, the secretary of state for war etc.

CHAPTER XIV.

Adjective Private law.

Substantive and adjective law distinguished. Adjective Law or the law of procedure may be defined as that branch of the law which governs the process of litigation. All the rest is substantive Law. Substantive Law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. Thus whether I have a right to recover a property is a question of substantive law, but in what court and within what court and within what time I must institute proceeding are questions of procedural law.

Substantive and adjective law distinguished. *B. L.* 17 (*a*), (*b*).

Contents of Adjective Law. Adjective law consists of rules for :—

Contents of Adjective Law.

(i) Selecting the jurisdiction which has cognizance of the matter in question. A remedial right cannot be enforced anywhere and everywhere. Jurisdiction is determined by (a) place, (b) money value of the suit and (c) special nature of the suit, *e. g.*, probate cases cannot be tried by Munsiffs. [see (ii) below].

(ii) Ascertaining the Court which is appropriate for the decision of the suit.

(iii) The action: Setting the machinery of the court in motion so as to procure its decision. This consists of the following steps:

(a) The summons or citation by which all parties interested are brought before the court. In some cases the court orders the addition of certain persons as parties; these are called "*extraneous parties.*"

Pleading.

(b) Pleading: Pleading consists of the statement of the cases of both the parties. The plea of the defendant may be 'premptory' showing that the right of action is non-existent or, 'dilatory,' showing that it is not yet available, or 'exceptio' (called in English Law 'a plea in confession and avoidance') "in which the facts alleged by the plaintiff are admitted, but it is contended that in law they are no ground for his claim against the defendant."

Peremptory dilatory, 'exceptio.'

(c) The Trial: At the trial or hearing each party tries to prove his case as set out in his part of the pleadings. Questions of law will be proved by citing authorities and questions of fact will be proved by adducing oral and documentary evidence. The law of evidence is the most important part of the law of procedure. It lays down rules regarding the admissibility of proof which are meant for the purpose of limiting the field of enquiry and excluding such evidence as has a remote bearing on the matters in issue.

(d) The judgment: The court in pronouncing judgment decides the question in litigation.

(e) The appeal.

(f) Execution. Tht last step in the proceeding, is the use of physical force in the maintenance of the judgment when voluntary submission is wanting.

Execution in a civil suit is not "ex-officio" that is to say, it does not take place except on the demand of a litigant party.

Execution in a civil case is not 'exofficio,' *B. L.* 16 (*b*).

Like substantive law, the law of procedure may also be modified on account of abnormality of persons concerned. Thus for example an alien enemy cannot sue or be sued, a peer is privileged from arrest, etc.

CHAPTER XV.

Public law.

We have now considered the various kinds of rights under the first of the three great divisions of law, *viz.*, Private Law; we shall devote the present chapter to Public Law and shall deal with International Law in the next.

Six topics.

The distinction between Private and Public Law has already been noticed (Chapter X). Professor Holland considers Public Law under the following six topics :—

I. Constitutional Law.

1. Constitutional Law. Constitutional Law defines the form of government.

Its province.

To regulate how the various organs of the government are to exercise their respective functions, what rules of succession are to govern the devolution of the supreme executive authority, what the privileges, powers and responsibilities of ministers, judges and other officers are, how people are to be represented in Parliament or some other constitutional assembly, how laws are to be passed or repealed, what relations shall subsist between the mother-country and her colonies or between the church and the state, who shall control the army, declare war or make peace,—these and other like matters are included in the province of Constitutional Law.

II. Administrative law. Administrative law deals with (1) Legislation, (2) Administration of justice (3) Management of property and business of the state, (4) Executive government and (5) Working in detail of the machinery of the State. But in its specific sense, Administrative Law refers to the fourth and fifth of the foregoing subjects and includes (*a*) collection of revenue, (*b*) management of the Army and Navy, ship-building and fortifications, (*c*) government of the colonies and dependencies, (*d*) collection of statistics, and (*e*) promotion of the well-being of the members of state by the prevention of evil and production of good.

II. Administrative Law.

Its province.

III. Criminal Law: Substantive. Substantive Criminal Law defines the rights of the state as guardian of the order. It enumerates the acts which infringe upon these rights and provides for the punishment.

III. Substantive criminal Law.

Criminal Law is comparatively modern. In the early times offences against the state were punished by an exceptional executive or legislative act but offences against individuals, howsoever grave were treated as civil injuries capable of being compensated in damages.

Criminal Law is modern *B. L.* 16 (*b*).

Criminal Law is either substantive or Adjective Criminal Procedure will form our next tonic (IV) Substantive Criminal Law consists of two parts, a general and a particular.

The two parts of criminal law: general and particular.

The general part deals with the nature of crimes, the responsibility of the wrong-doer on the ground of intentional negligence, etc., the effects of tender age, compulsion, insanity, idiocy, or drunkenness upon the criminality of

an act—circumstances which justify or lessen the criminality of a criminal act,—and the effect of aiding and abetting a crime, criminal attempts and cumulative punishments.

The particular part contains a classification of criminal acts and specific provisions with regard to the penal consequences of each.

IV. Adjective Criminal law or Criminal Procedure.

IV. Criminal Procedure. Criminal Procedure "consists of a body of rules whereby the machinery of the courts is set in motion for punishment of the offenders." It is of two kinds (1) simple which is applicable to minor offences and (2) solemn, which is followed in the case of serious offences.

It is simple or solemn.

The stages of procedure.

According to Professor Holland criminal procedure consists of the following stages: (1) choice of the proper jurisdiction; (2) choice of the proper court (see Chapter XVII); (3) the procedure proper, consisting of the summons, the preliminary investigation, the pleadings, the trial and the judgment; and (4) execution by which the judgment is carried into effect.

V. Law of the state as a juristic person.

V. Law of the state as a juristic person. The state as a great juristic person has many rights and duties in its relations to subjects and aliens. These rights resemble those subsisting between individuals under Private Law. Thus the state holds property, lends and borrows money, enters into contracts, etc., etc.

VI. The procedure relating to the state as a juristic person.

VI. The procedure relating to the state as a juristic person. When the state is either the plaintiff or the defendant in a suit, the procedure followed is somewhat different from the ordinary procedure.

CHAPTER XVI.

International Law.

The subject of the present chapter consists of those rules which regulate the inter-relation of states. This body of rules is called law of nations or International law. The underlying idea is that a state has the same capacity for rights as a natural person, and in its external transactions with other states, it exhibits that side of its character which is called its international personality. Each member of the general family of states possesses the same legal nature and the respect for this common nature based upon civilisation and common humanity is the foundation of International law.

Definition. International law has been defined by Professor Hall as consisting in certain rules of conduct, which modern civilised states regard as being binding on them in their relations with a force comparable in nature and degree, to that binding the conscientious person to obey the law of his country, and which they also regard as being enforceable by appropriate means in case of an infringement. Definition.

The nature of International law. Jurists are not unanimous in their opinion as to the essential nature of International Law. The propriety of calling this body of rules International *law* will be discussed in Appendix A. According to Is International law law at all? *B. L.* 13 (*a*).

Professor Holland, it is impossible to regard the rules of International law as being in reality anything more than the moral code of nations.

"International Law is the vanishing point of jurisprudence."

International law is the vanishing point of Jurisprudence. International Law, says Professor Holland, is the vanishing point of Jurisprudence. International Law is just outside the scope of jurisprudence as understood by him. He has defined jurisprudence as the formal science of law imposed upon the subjects by a sovereign political authority. When both the person of inherence as well as the person of incidence of a right are private individuals the right is private right and the corresponding law is private law. In public law one of the persons is the state But in private as well as public law the arbiter of disputed questions is the state and the law therefore is imposed by the sovereign over the subjects. In Internatoinal Law both the persons concerned are independent states. Here, therefore, there can be no question of a law imposed by sovereign over subject International Law is thus outside the scope of jurisprudence.

B. L. 09 (*b*), 10 (*b*), 13 (*b*), 14 (*b*), 16 (*b*), 17 (*b*).

B. L. 19 (*a*).

Scope of International L.

Scope of International Law. The topics that fall within the natural scope of the science of International Law are generally those that arise in connection with private law. It has been remarked that the law of nations is but private law writ large.

The law of nations is but private law writ large.

The law of nations is but private law writ large. This means that International Law is an application to political communities of those

legal ideas which were originally applied to the relations of individuals. Just as in private law, so in International law, we are concerned with the persons, for whose sake rights are recognised, with the rights so recognised, and with the means of protecting those rights. Here also we have got the distinction between substantive and adjective law, between normal and abnormal persons, and between antecedent and remedial rights in rem and in personam. So the distinctions known to private law are applicable in international law not to private individuals, but to larger bodies namely the states Thus it has been said that the law of nations is but private law writ large

B. L. 10 (*b*), 11 (*b*), 15 (*a*), 18 (*b*), 18 (*a*) & (*b*).

I. International personality. The International law of persons consists of an investigation into the nature of states which are persons in the eye of the law of nations. International persons may either be normal or abnormal A normal international person is a state that enjoys full external sovereignty and is recognised as a member of the family of nations The external sovereignty of a state implies its independence of any foreign state A dependent state is not an international unit, and possesses no international personality. All normal states are theoretically equal.

I. International Law of Persons.

Normal.

Instances of abnormal international persons are semi-sovereign states, *i.e.*, those which are to some extent dependent on another state.

Abnormal.

II. Antecedent International Rights. International rights are either antecedent or reme-

II. Antecedent Inter-

national Rights.

dial. They are antecedent when they do not arise from wrong-doing, and are enjoyed by a state against all other states. Antecedent rights may be either in rem or in personam. Antecedent international rights in rem are (a) right to safety, (b) right to reputation, (c) right to ownership, (d) right to jurisdiction and (e) right to protection of subjects in foreign states.

B.L. 08 (b), 13 (b).

(a) Safety.

(a) When the right of a state to exist in safety is violated, there arises the remedial right of self-preservation.

(b) Reputation.

(b) The reputation of the state or its good name is valuable in its external relations with neighbours, for, the glory of the state leads to respect from, and friendship of other states.

(c) Ownership.

(c) International ownership or dominium refers to territory and is essential to the existence of a state. The territory of a state is that portion of the earth's surface which is in its exclusive possession and control and from which it can exclude all alien interference. A state may acquire ownership either originally, e.g., by appropriation or derivatively, e.g., by purchase, conquest, etc.

(d) Jurisdiction.

(d) The state can exercise jurisdiction within its own territory But this jurisdiction is artificially extended, by what is called the doctrine of extra-territoriality, outside the limits of its dominions to all ships flying its flag on the high seas. A state has also jurisdiction over its own ambassadors abroad. All nations are equally entitled to suppress piracy on the high seas.

(e) Each state has a limited right to the protection of its subjects and their interests in foreign countries.

International rights in personam arise out of treaty and are analogous to those of private law, wtih the exception that form and consideration are not essential and that the contract is not vitiated by duress. *B. L.* 14 (*a*).

III. Remedial International Rights. The remedial rights vary according to the nature and extent of the rights violated. In minor cases of violation, *e.g.*, an insult to a state, an apology may be considered sufficient, while usurpation of property may give rise to remedial rights attended with serious consequences. III. Remedial International Rights.

IV. Adjective Law of Nations. When International remedies are not peacefully obtained states resort to other means of redress, according to what may be called the adjective law of nations. This may be considered either as affecting tde parties which is called the law of belligerency or as affecting the relations between any of the belligerents and of neutral state, called the law of neutrality. IV. Adjective Law of Nations.

A. The Law of Belligerency. Redress for a violated right may be obtained in a friendly manner by (1) negotiation, (2) arbitration or (3) the mediation of other states. These are steps short of war. Redress may also be obtained by war which is sometimes called international litigation. Upon the question whether war should be preceded by a declaration, the jurists are divided. Questions relating to the conduct of warfare may be considered under four heads: Belligerency.

viz., (1) military operation ; (2) treatment of the enemy country while occupied ; (3) 'commercia belli,' *i.e.*, such exception to the rule against intercourse between enemies as truces, capitulations, safe-conducts and cartels ; and (4) reprisals for breaches of the law of war.

Neutrality.

B. The Law of Neutrality. The relation of belligerents to neutrals may be best considered under two heads : (i) rights of neutrals and (ii) duties of neutrals.

Rights of neutrals. *B. L.* 13 (*b*).

(i) *Rights of Neutrals.* Such rights are (a) to internal sovereignty; (b) to inviolability of its public ships ; (c) subjects to certain exceptions to the security of persons and property of its subjects within the territory of a belligerent ; (d) to continuance of diplomatic relations with a belligerent and (e) to recognise a revolting people as belligerent of a state.

Duties of neutrals.

(ii) *Duties of Neutrals* Such duties are (a) to forbid its subject to assist a belligerent in war by furnishing troops, money, arms, passage, etc., (b) to prevent belligerent acts taking place in its own territory or the same being used as a base of operation by the combatants and (c) to allow belligerents to punish its subjects against whose conduct they have a cause of complaint.

CHAPTER XVII.

The Application of Law.

In the application of the principles of law whether public, private, or international, three questions present themselves:—I. What state has jurisdiction to apply the law to the facts of a particular case? (*Question of forum*). II. What kind of Law will it apply? (*Question of Lex.*) III. What interpretation will it put on law? (*Question of interpretation*). We shall consider these three questions in each of the three classes of law (private, public, international) taken separately.

Three questions in application of law to a case.

1. Forum.

2. Lex.

3. Interpretation.

I. Application of Private Law. (i) Question of Forum. The possible courts which can take cognizance of a case are the courts of:—(a) the country in which the plaintiff or defendant is domiciled, or to which he owes allegiance; (b) the place where the defendant happens to be; (c) the country in which the disputed object is situated; (d) the country in which the juristic act in question took place; (e) the country in which the wrongful act in question took place; (f) the country in which a contract was to produce its results and (g) the country in which the plaintiff chooses to commence proceedings. The proper forum (court) in a particular case is one or more of these, according to the circumstances of the particular case.

1. Private Law.

(i) Fora.

(ii) Lex.

(ii) Question of Lex. The circumstances affecting the solution of question of lex (the law to be applied) are (1) Concentricity, (2) Time, (3) Race and (4) Place.

(1) Concentricity.

(1) *Concentricity*. Sometimes there may be circles of law. A city may be governed by its own law or by the law of the province or by the law of the kingdom. In such cases the general rule is that the nearer and the narrower law is to be applied, rather than the more remote and wider.

(2) Time.

(2) *Time*. Laws have no retrospective effect unless expressly provided. This holds good in the case of substantive law In matters of procedure a new law is always retrospective unless otherwise expressly provided.

(3) Race.

(3) *Race*. Distinction of law for distinction of race is now very rare, and the common distinction is of territory. There is a 'personal' stage in the development of law when it is applied according to race and not according to territory. The Hindu law and Muhamadan law are applied according to this notion. The notion of territorial law is modern.

(4) Place.

(4) *Place*. The law of the place of decision (lex fori) if rigidly followed becomes inconvenient and inequitable. Hence the possible law may be that of the country to which one person concerned owes allegiance, in which he is domiciled, in which the thing is situated, in which the wrong in question was committed, in which an act was performed or in which a contract was to be performed.

Possible Law.

Private International law. It is the body of rules which are followed by courts when called uopn to adjudicate with respect to matters arising between persons of different nationalities ; it is the application of laws of different states to the international relations of private citizens. The body of principles has been called by various theorists by various names, (the following seven being the chief), which are all open to objections. They are :—(1) Private International law, (2) International Private law. (3) Conflict of laws, (4) Extra-territoriality, (5) Application of law, (6) Comity, and (7) Statutes

Private international law.

Its nature and various names.

(iii) Question of interpretation. Interpretation is either (a) Legal, which rests on the same authority as the law, being either—(1) authentic, when expressly provided by legislature ; or (2) usual, when derived from unwritten practice, or (b) doctrinal, which rests upon intrinsic reason ableness being either—

(iii) Interpretation : Kinds of interpretation.

(a) Legal.

(b) Doctrinal.

(1) grammatical, turning on the meaning of words and sentences, or

(2) logical, turning on the intention of the legislature, whether (x) extensive, as stretching the words, or (y) restrictive, as restricting them.

II. Public law. The questions arise chiefly in the criminal branch of Public law.

II. Public Law.

(i) Question of Forum Possible *fora* are those of—1. the nation of which the offender is a subject, 2. the domicile of the offender 3. the nation injured, 4. the place of the arrest or detention of the offender, and 5. the place where the offence was committed.

(i) Possible fora.

Theories of competent forum *B. L. Jun. 09, Jun. 13.*

Four theories as to the competent forum: (*a*) The territorial theory asserts that each state may, and ought to deal with all persons, be they subject or aliens, who commit offences within its territory, or on board its ships, against its criminal law. This is true but inadequate.

(a) Territorial theory.

(b) Personal theory.

(*b*) The personal theory is that each state has a right to the obedience of its own subjects wheresoever they may be. This is largely adopted in practice.

(c) Quasi-territorial theory.

(*c*) The quasi-territorial theory of self-preservation asserts that the courts of a state may punish offences, although committed, not only outside its territory, but also by persons who are not its subjects. This is usually asserted with reference to offences against a government, or its public credit.

(d) Theory of general supervision or cosmopolitan justice.

(*d*) By the theory of "general supervision" or of "cosmopolitan justice" each state may punish any criminal who may come into its power—a theory long accepted with reference to pirates.

It is obvious that the adoption by a State of one or other of the four current theories of jurisdiction, or of a combination of several of them, will determine not only the exercise of its own criminal jurisdiction with reference to a given set of facts, but also its recognition of the rightfulness of exercise by the other states of their jurisdiction with reference to the same set of facts.

In English law, "autrefois acquit" or "autrefois convict" in a competent foreign court is a good defence.

(ii) Question of lex. It is not frequent occurrence in criminal law. Questions as to (1) concentricity and (2) time occasionally occur, but questions as to (3) race and (4) place are hardly separable from the question of forum. (ii) Question of lex.

The questions of criminal forum and lex have much in common, and have sometimes been treated in conjunction with the analogous topics of private law

(iii) Question of Interpretation. They are the same both in public and in private law. (iii) Interpretation.

III. International Law: (i) Question of forum. Such a question cannot arise at all, because each is the judge of its own quarrels, and the executioner of its own decrees. III. International law (i) Forum.

(ii) Question of lex: The question has little analogy to that in municipal law (whether public or private). The question arises whether the nations belong to the "family of nations," and therefore, whether international law should be applied at all (ii) Lex

(iii) Question of Interpretation: The question of interpretation in municipal law applies here, so far as it may be applicable, regard being had to the essential difference between the systems. (iii) Interpretation.

APPENDIX A.

The Law of Nature.

Laws of Nature are one branch of Moral rules

In following the divisions and sub-divisions of law, taken as rules of human actions, we have seen, in Chapter II, that the 'Laws of Nature' are the most important species of moral rules.

(1) The Modern sense of the expression, Law of Nature.

The modern sense of the expression. For the purposes of modern Jurisprudence, by 'Law of nature' we mean such of the received precepts of morality relating to overt acts and therefore capable of being enforced by political authority, as either are enforced by such authority or are supposed to be fit so to be enforced.

(2) The Greek Sense

Greek sense Viewed in the above sense the expression 'Law of Nature' is restricted to denote only rules regulating the order of the physical world But the original conception of the Greeks was of a wider nature The Greek Philosophers thought that the moral as well as the material phenomena of the world could be resolved into some simple and general rules which were called by them the Laws of Nature.

Ulpian.

Ulpian's Conception. Of a somewhat similar character is Ulpian's conception of Jus Naturale, which, as he says, prevails among animals as well as men regulating the nurture of the young and the union of the sexes. According to this idea the Law of Nature is rather a blind

instinct resembling the forces which sway the inanimate world.

(3) The narrower sense of the Romans.

The narrower sense of the Romans. The Roman lawyers, before they had learnt the Greek philosophy had adopted as the result of intercourse with other nations a body of laws which, under the name of Jus Gentium or law common to all nations, they very extensively applied When after the conquest of Greece by Rome, Greek philosophy was introduced into that city the belief gradually prevailed amongst the Roman lawyers that their old Jus Gentium was in fact the lost code of Jus Naturale

The Roman Jus Gentium.

Jus Naturale identified with Jus Gentium.

Practical conclusions drawn from the doctrine of Jus Naturale.

Practical conclusions from the doctrine. Professor Holland draws the following practical conclusions from the doctrine of Jus Naturale .—

(1) Some acts, though not forbidden by Natural Law are prohibited by Positive Law, *e g* , the act of growing tobacco in England. Such acts are called *mala prohibita* and not *mala in se* .

(1)

(2) Positive laws have been said to be invalid when they contradict the law of nature.

(2)

(3) Natural law or natural equity, has been often called in to justify a departure from the strict rules of positive law.

(3)

(4) In cases for which the law makes no provision, the courts are sometimes authorised to decide in accordance with the principles of natural law. Thus the Indian courts are

(4)

to administer according to justice, equity and good conscience.

(5) (5) English courts refuse recognition to a foreign judgment when the proceedings in which the same was obtained are opposed to natural justice.

(6) (6) The law of Nature is the foundation, or rather the scaffolding, upon which the modern science of International Law was built up by Gentili and Grotius, who assumed that there was a determinable Law of Nature which was binding upon states as amongst themselves.

The nature of International Law.

The nature of International Law. The status of the rules forming what is called International Law is a bone of contention amongst jurists.

Austin.

Austin, in view of his recognition of a fundamental distinction between a definitely organised society with determinate organs for making and enforcing law, and a society, which lacks such organs, naturally held Positve Law and International Law to belong to different categories.

Westlake.

Professor Westlake thinks otherwise. The leading idea which determines the use of the English word 'law,' he contends, is enforcement through action, regular or irregular, of a society. According to him states do not act upon the rules of International Law as freely choosing to do so in each instance, but obey them from a persuasion that the rules are law. The mental attitude towards the rules is con-

sidered by him a sufficient justification for calling them law.

Professor Jethro Brown says that these rules are law in becoming—law struggling for existence, struggling to make itself good in contradistinction to International Morality and like the customary law of undeveloped societies entitled to be called law in virtue of their likeness to law strictly so called—the Positive Law which is the subject-matter of Jurisprudence Jethro Brown.

According to Professor Holland it is impossible to regard the rules of International Law as being in reality any thing more than the moral code of nations Holland.

Mr. Salmond regards the law of nations as a kind of conventional law by which he means a system of rules agreed upon by persons (states in this case) for the regulation of their conduct towards each other Salmond

Mr Salmond classifies the various competing theories regarding the nature of International Law as follows :—(1) That the law of nations is, or at least includes a branch of natural law, *viz* , the rules of natural justice as applicable to the relations of states inter se.; (2) that it is a kind of customary law, viz , th rules actually observed by states in their relations to each other; (3) that it is a kind of imperative law, *viz.*, the rules enforced upon states by international opinion or by the threat or fear of war; and (4) that it is a kind of Conventional Law.

APPENDIX B.

Calcutta University Questions.

CHAPTER I

The Science of Jurisprudence.

Q Define Jurisprudence B L 1870, 1882; Jan. 12, Jan 13, Jan 14, Jan 18, Jan 19, Jul 21

Ans See page 5

Q "Jurisprudence is the formal science of positive law" Explain and discuss B L Jan 11, Jun 11, Aug. 18; Jun 20, Jul 24

Ans See Pages 5—9

Q Analyse the concepts involved in the different terms used in the above definition B L Jan 11

Ans See Pages 5—9

Q Analyse the term Jurisprudence" B L Jan 24

Ans See pages 5—9

Q. Jurisprudence is the formal science of those relations of mankind which are generally recognised as having legal consequences' Explain and criticise B. L Jan 23

Ans See Pages 5– 9

Q Explain the scope and purpose of Jurisprudence, as defined by Holland B L, Jan 22

Ans See Pages 5—9

Q Give comprehensive definition of Jurisprudence explaining carefully the terms employed by you. B. L. Jan 25.

Ans. See pages 5—9.

Q. How does Jurisprudence differ from comparative Law? B. L., Jan. 22.

Ans. See pages 5—6.

Q. Mention some improper uses of the term (Jurisprudence). Is the science of Jurisprudence divisible into several species? B. L. Jan. 12.

Ans. See pages 16 and 9—12.

Q. Is it (Jurisprudence) divisible into (a) general and particular, and (b) historical and philosophical? B. L. Jan. 13

Ans. See pages 9—12.

Q. Jurisprudence has been divided into (a) 'general' and 'particular,' (b) 'historical' and 'Philosophical.' Explain and Justify B L. Jul 23

Ans See pages 9-12.

Q Examine the validity of the distinction made between (a) particular and universal jurisprudence; and (b) historical and philosophical jurisprudence. B. L. Jan 14.

Ans. See pages 9—12

Q What are the defects of Bentham's division of Jurisprudence ? B L 1896

Ans. See page 16.

Q. What is the true province of Jurisprudence? B. L. 80.

Ans. See pages 7—9.

Q. How is Jurisprudence related to (a) Politics and (b) Ethics? B. L. Jan. 15.

Ans. See pages 18—19.

Q. Distinguish the provinces of Ethics, Political Economy and Jurisprudence. B. L. Jul. 25.

Ans. See pages 18-19.

Q. Explain and illustrate the assertion that Jurisprudence is a formal Science of Law. B L. Jul. 19.

Ans See Pages 5—9

CHAPTER II

AND

APPENDIX A

Law: Positive Law

AND

The Law of Nature.

Q How would you define Law? B L. Jul 09, Jan. 14.

Ans See pages 20 and 29

Q "Law is the highest reason, implanted in Nature, which commands those things which ought to be done and prohibits the reverse" Cicero Explain B. L. Jul. 22.

Ans. See pages 25—26, Appendix A Page 195.

Q. Explain the different senses in which the term law has been used How would you define it? B. L. Jan. 12.

Ans. See pages 20— and 29.

Q. What are the common characteristics of all laws? B. L. 84.

Ans. See page 23.

J. How does Holland define 'Law' in the proper sense of the term? Explain shortly the important words in the definition. B. L. Jun. 16.

Ans. See pages 29, 25—28

Q. Give a proper Definition of law and criticise some of the definitions suggested by other Jurists B. L Jan. 25.

Ans. See pages 20—.

Q. Explain what is meant by 'Laws of imperfect obligations.' Is such a conception admissible in a theory of Law as propounded by Holland? B. L. Jul 22.

Ans. See pages 25—29.

Q. State the practical conclusions drawn from the doctrine of *jus naturale* B L Jun 07 ; Jul 19

Ans See Apperdix A Page 197

Q. Write a short historical note on the Law of Nature B. L Jun 11.

Ans. See Appendix A Page 196

Q. Write an explanatory note on the "Law of Nature." B L. Jan. 22, Jul 24

Ans. See Appendix A

Q. What do you understand by a 'Law of Nature?' Discuss the progress of the idea in France and its importance in modern International Law. B. L. Jun. 13.

Ans. See Appendix A. Page 196 and Maine's Ancient Law.

Q. What is the Law of Nature? Sketch the history of the doctrine relating to this law, and briefly indicate some of the practical conclusions deduced from it. B. L. Jan. 11.

Ans. See Appendix A. Pages 196—198.

Q. Explain clearly the relation between law and the sovereign power. B. L. Jan. 10.

Ans. See pages 20—29.

Q. What is the law of Nature? Sketch its modern history. B. L. Jun. 09.

Ans. See Appendix A. Pages 196.

Q. Define positive law. B. L. Jun. 14; write short notes on 'positive law.' B. L. Jan. 11.

Ans. See page 29.

Q. Analyse the notion of positive law briefy stating its constituent elemets. B L Jul. 12; Jun. 17.

Ans. See page 29.

Q. What is Nomology? How is Jurisprudence related to Nomology? B. L. Jan. 20.

Ans. See pages 24— .

Q. "The presence or absence of compulsion is not necessarily the dividing characteristic between morality and law." Discuss. B. L. Jul. 19.

Ans. See pages 25—26.

Q. How is ethic related to nomology? B. L. Jun. 14.

Ans. See page 24.

Q. Indicate the relations subsisting between principles of morality and positive law. B. L. Jan. 12.

Ans. See page 26 F. N. (4).

Q. "Though much ground is common to both the subject-matter of law and ethics is not the same." Explain. B. L. Jan. 22.

Ans. See page 24.

CHAPTER. III.

The Various Theories of Law.

Q. "Law is command." Examine. B. L. Jan. 10; Jul. 10.

Ans. See page 31.

Q. What is the Austinian conception of law? How far are you prepared to accept it? Give reasons for your answer. B. L. Jan. 13

Ans. See pages 31—37.

Q. State and Criticise the Austinian conception of Law. B. L. Jan. 24.

Ans. See pages 31-37.

Q. 'Law is coercive' criticise B. L. Jun 14.

Ans See page 34.

Q. State and criticise the Austinian conception of Law. B. L. Jun. 17.

Ans. See pages 31—37.

Q. "Law has been for centuries described as a 'command' but this description though essentially true is inadequate to the extent of being misleading" Holland, Develop. B. L. Jan. 18.

Ans. See pages 31—37.

Q. "Austin defined law as species of command. The historian has declared it unhistorical, the lawyer unpractical, the philosopher superficial." Examine· B. L. Jan. 21.

Ans. See pages 31 .. ..

Q. " Law is the King of Kings, far more power-ful and rigid then they · nothing can be mightier than law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong "—The Vedas. Criticise. B. L Jul. 23

Ans. It is the Vedic conception of law, according to which Law is the *Kshatra of Kshatra* i e more prowerful than the power itself and exists without the Sovereign and is above the sovereign ," The rule of law is above the individual and the State, above the ruler and the ruled ; a rule which is compulsory on one and on the other; and if there is such a thing as sovereignty, it is juridically limited by this rule of law "

Hence this view of law is opposed to the modern conception of law according to which no law exists without a sovereign, above the Sovereign or beside the sovereign—but exists only through the Sovereign. See the definition of Law on p. 29 and Nature of sovereignty on pages 41..... . .. .

CHAPTER IV.

Soverignty.

Q. Explain and illustrate : (a) external sovereignty, internal sovereignty, (c) state, (d) simple state and (e) system of states. B. L. Jan. 09.

Ans. See pages 47, 48, 42.

Q. Discuss the theory of sovereignty. Do you support it? If so, on what grounds? B. L. Jan. 12.

Ans. See pages 41—42 and 48—49.

Q. Define Political Sovereignty, Legal Sovereignty. Explain your definitions. B. L. Jul. 25.

Ans. See pages 41—.

Q. Discuss the doctrine of sovereignty How, if at all, will you apply it to Hindu Law?

Ans. See pages 41—42. According to the Hindu idea law does not consist of the commands of the king but emanates from a source superior to the king and the duty of enforcing the same is cast upon him from God.

Q How far is it true to say that there can be no Law apart from the existence of a state and of a sovereign power within it? B. L. Jul. 19.

Ans See pages 35—36. (Seventh criticism).

Q. Explain and illustrate the following statement: The Austinian conception of positive law is "an ideal or abstraction relater to actual phenomena as are the axioms of mathematics to the actual conditions of matter or the postulates of political economy to the dealings of ordinary life" Holland B L. Jul. 22.

Ans. Austin's conception of Positive Law is that it is a command of the Sovereign; but a considerable doubt has of late been thrown upon the doctrine. Thus Maine points out some facts of history to which the doctrine is not applicable: what sense is there, he asks, in saying that the village customs of the Punjab were enforced by Ranjit Singh ? (See the seventh criticism on page 35). So he argues that this conception of Positive Law, apart from being applicable only to the Roman Empire, is "an ideal

or abstraction, etc.," in so far as other political societies are concerned. But as Professor Holland shows, this criticism of Maine is not sound. See pages 35-36, 48.

Q. Are there any limitations upon the power of the sovereign B. L. Jan. 25.

Ans. See pages 46. .....and also F. N. on p 49.

CHAPTER V.

The Sources of Law.

Q. Indicate the sources of law and briefly define their nature.

Ans. See page 50

Q. Enumerate and briefly characterise the sources of law. B. L. Jan. 14; Jun. 14.

Ans. See page 50.

Q. Indicate clearly the relation between custom and law? B. L. Jun. 15.

Ans. See pages 61—66.

Q. How does custom grow, and when is it transformed into law? B. L. Jun. 15; Jul. 21.

Ans. See pages 62—66.

Q. Discuss the relation between law and custom and explain at what moment a custom becomes law. B. L. Jul 09; Jan. 10; Jan. 12.

Ans. See pages 61—66.

Q. Classify the different sources of law known to you. How does adjudication differ from legislation as a law-making agency? B. L. Jul. 19.

Ans. See pages 50, 53 and 51.

Q. Write a short essay on either (a) custom and its importance in Jurisprudence or (b) "Judge made Law." B. L. Jul. 22.

Ans. See pages 61, 63 and 53.

Q. What is equity? Trace briefly the growth of the equity jurisdiction in England, and compare English and Roman equity. B. L. Jun. 11.

Ans. See pages 55—56 and 58—60.

Q. Enumerate the sources of Law. Indicate the part played by Equity in the development of law. B. L. Jan. 24.

Ans See pages 50, 55—60

Q. What do you mean by sources of Law? B. L. Jul. 12; Jun. 13; Jan 22 Illustrate your answer by special reference to one of the following:—(a) Religion (b) Legislation. B. L. Jul. 12.

Ans See pages 50, 60, 51.

Q. Whate is custom? At what moment does it become Law? What weight would you attach to the *obiter dicta of judges*. B L. Jun 13, Jan. 16.

Ans. See pages 61, 65, 61 F. N.

Q. What is custom—When does it become law? State briefly the different views on the matter. B. L. Jan. 19.

Ans. See pages 61, 65—66.

Q. Describe and illustrate the growth of usage into Custom and of Custom into law. B. L. Jul. 23.

Ans. See pages 62—64.

Q. "A great part of the modern law has been derived from popular customs which have been held to be laws before being adopted by the state and independently of such adoption. The state enforces them because they are laws; they are not laws because the state enforces them." Examine this statement. B. L. Jun. 20.

Ans. See pages 65— .

J. Write a short note on custom as a source of law. B. L. Jan. 23.

Ans. See pages 61— .

Q. Enumerate the sources of law and briefly indicate their nature. B. L. Jun 14.

Ans. See page 50.

Q. Indicate the part played by one of the following agencies in the development of law:—(a) Custom (b) Equity. B. L. Jul. 10.

Ans. See pages 61—66, 55—60.

Q. Discuss the importance of ' Custom ' as a source of ' law '. When does custom become ' law '?

Ans. See pages 61.....and 65.

Q. " Two questions are much debated with reference to usage." Holland. What are they? At what moment does a custom become law ? B. L. Jul. 25.

Ans. See pages 62—63 and 65.

Q. Characterise the importance of "custom" as a source of law proper; and illustrate your remarks with reference to the "common law" of England. B. L. Jan. 22.

Ans. See pages 61, 63.

Q. "With conscience that is only *naturalis et intera* this court (equity) has nothing to do." Lord Nottingham. Explain. How would you reconcile this statement with the saying that equity was originally a court of conscience? B. L. Jan. 20.

Ans. See page 58 F. N.

CHAPTER VI.

Legal rights and duties.

Q. Explain the meaning of "Right" and distinguish a legal right from all other rights. B. L. Jan. 09.

Ans. See pages 68, 69.

Q. Define a "legal right." Are rights and duties always correlative? Can you conceive of a legal right which is not enforceable by any legal process? B. L. Jan. 22.

Ans. See pages 69, 71, 69—70.

Q. "The immediate objects of law are the creation and protection of legal rights." Explain and discuss. B. L. Jul. 24.

Ans. See pages 67—68.

Q. Explain the term 'Right' and its ambiguities. What is the relation of law to right? B. L. Jul. 10.

Ans. See pages 68—69.

Q. Define 'Right.' B. L. Jan. 13.

Ans. See page 68.

Q. "Law is something more than police." Explain. Indicate the purposes and objects of law. B. L. Jan. 14; Jun. 15.

Ans. See pages 67—68.

Q. "A moral right and a legal right are so far from being indentical that they may easily be opposed to one another." How? B L. Jun 13.

Ans. See page 69

Q. Write notes on—'Sanction' B. L. Jul. 12; Jan. 21; Jan. 24

Ans. See page 70

Q. "The object of a developed system of law is the conservation, whether by means of tribunals or of permitted self helf, of the rights which it recognises as existing." Holland. Develop

Ans See pages 67—68.

Q. Define rights anl duties and examine in the light of your definition Holland's view that the state has rights and duties. B L. Jun 20.

Ans See pages 68, 71, 73.

Q. "Every legal duty is founded on a moral obligation" (Coleridge C. J.) Do you consider this proposition to be correct? Is morality a proper subject for consideration in a work on Jurisprudence? B L. Jan. 25.

Ans. See pages 71, 72 and 18.

CHAPTER. VII.

Analysis of Rights.

Q. What is meant by the terms 'the person of inherence, 'the person of incidence'? Classify persons. Discuss the relation of will and consciousness to an Act. B. L. Jun. 13.

Ans. See pages 76,77, 82—83.

Q. What do you understand by a dynamic aspect of a right? How are rights set in motion? B. L. Jan. 25.

Ans. See pages 76-77 and 105.

Q. Explain the characteristics of a person in law. B. L. Jan. 20.

Ans. See page 77.

Q. What are the requisites of "juristic" Personality"? Is the personality real or fictitous? B. L. Jan. 22.

Ans. See page 79.

Q. Analyse the idea of a legal right, and show by an illustration how events may affect a man's rights. B. L. Jun. 16.

Ans. See pages 76, 81.

Q. Write a short essay on juristic person. B. L. Jan. 25.

Ans. See pages 79.....

Q. State reasons in explanation of the rule—ignorance of law is no excuse. B. L. Jan. 17; Jan. 23.

Ans. See page 85.

Q. Define a "Juristic act." What are its requisites and modes of expression? B. L. Jan. 17; Jan. 18; Jan. 21.

Ans. See pages 89—

Q. Analyse 'Right.' B. L. Jan. 09; Jan 11; Jan. 12. Explain and illustrate the distinction between 'natural' and 'artificial' persons. B. L. Jan. 12.

Ans. See pages 76, 78—80.

Q. "The essential elements of an 'Act' are three namely, an exertion of the will, an accompanying state of consciousness, a manifestation of the will. Discuss this proposition. Is the test applicable to all "Acts"? B. L. Jul. 10.

Ans. See pages 82—89.

Q. "The state of the mind of wrong-doer of an act is often the subject of legal enquiry" Holland Why? How far is 'intention' an element of legal liability? B. L. Jul. 25.

Ans. The object is to ascertain whether it exhibits the phenomenon of intention; *e.g.*, in the case of establishing the cancellation of a will, actual malice in libel *etc.* Also see pages 83... .. ..

Q. What is a juristic Act? Give some examples of acts which are not juristic. B. L. Jan. 25.

Ans. See pages 89. . . ..

Q. What do you understand by Negligence? Can you indicate any standard for measuring Negligence? Give illustrations. B. L. Jul. 10.

Ans. See pages 87-89.

Q. What is a juristic act? Enumerate its essentials and specify its characteristics. B. L. Jan. 12; Jan. 19; Jul. 22.

Ans. See pages 89—

Q. Write short notes on the following—'artificial persons." B. L. Jan. 11 ; Jan. 23. 'Universitates Bonorum.' B. L. Jan. 17 ; Jan. 19.

Ans. See pages 79—80.

Q. State the essential characteristics of "corporation." How are corporations created and dissolved? B. L. Jan. 17.

Ans. See pages 176—177, 79.

CHAPTER VIII.

The Leading Classification of Rights.

Q. How would you classify the subject matter of Jurisprudence? Examine Holland's reasons for not accepting Austin's classification. B. L. Jan. 10.

Ans. See pages 94—97.

Q. Classify and illustrate the different kinds of legal right. B. L. Jan. 11 ; Jul. 21.

Ans. See pages 94—

Q. Examine carefully the different points of view from which rights may be surveyed. B. L. Jan. 25.

Ans. See pages 94..... ....

Q. How would you classify Right? What is the value of 'the radical division of rights'? Why does Austin reject this division ? What is the distinction between normal and abnormal rights? Where would you draw the line ? B. L. Jun. 13.

Ans. See pages 94—100.

Q. How should the law of Things be separated from the law of Persons? Is such a separation convenient? B. L. Jan. 20.

Ans. See pages 97. 99.

Q. How may Rights be classified? Illustrate. Which classification do you prefer? B. L. Jun. 15 ; Jul. 19.

Ans. See pages 94— , 95—96.

Q. Upon what principles may the field of law be divided? Which do you accept and why? B. L. Jun. 14.

Ans See pages 94— , 95—96.

Q Explain and illustrate rights in rem and in personam, rights antecedent and remedial B. L. Jan. 10 ; Jun. 11 , Aug 18.

Ans See pages 100, 101.

Q Write notes on Rights in rem and Rights in personam B L Jul 23

Ans See pages 100—101.

Q. Classify and illustrate different kinds of rights B. L Jun. 15

Ans See pages 94—

Q. How would you classify rights? B. L. Jan. 10 ; 11, 15.

Ans. See page 94.

Q. Write notes on—Remedial Rights. B. L. Jul. 12; Jan. 19.

Ans. See page 101.

Q How do the following differ—(a) a right in rem and a right in personam, (b) an antecedent right and a

remedial right? Give one illustration of each. B. L. Jan. 13; Jul. 19.

Ans. See pages 100—101.

Q. Distinguish Private from Public Law. Examine the place of Criminal Law in the scheme of classification. B. L. Jul. 10.

Ans. See pages 95—96.

Q. "It is a true and received division of law into *Jus publicum and Jus privatum*, the one being the sinews of property and the other of government." Lord Bacon. Explain. B. L. Jul. 23.

Ans. See pages 94—97.

Q. Define rights in rem and rights in personam B. L. July. 12.

Ans. See page 100.

Q. Explain the classification of rights in rem and rights in personam B. L. Jun. 16

Ans. See page 100.

Q. Contrast the characteristics of Private Law and Public Law and classify the topics included in the latter. B. L. Jan. 16.

Ans. See pages 95—96.

Q. "In Public law the state is not only arbiter, but is also one of the parties interested." Develop. B. L. Jul. 24.

Ans. In Public law the State is itself interested in or affected by it either in the capacity of a person of inherence or person of incidence. When it enjoys the right, it will exact the same of its own accord, and when it is the person of incidence, it may refuse to fulfil its obligation.

Now it is the State which defines rights both under Private and Public law. And it is also the same state which protects the rights so defined. It is the Judge to decide the respective claims of the parties—whether it happens to be one of the parties interested (as in Public law) or both the parties happen to be other than itself (as in Private law). See p 96.

CHAPTER IX.

Rights at Rest and in Motion.

Q. Define the 'orbit of a right.' B. L. Jan. 10; Jun. 14; Jun. 16.

Ans. See page 102.

Q. Distinguish between 'rights at rest' and 'rights in motion.' Give illustrations. B. L. Jun. 09; Jan. 10; Jan. 14; Jun. 14; Aug 18; Jan. 19; Jan. 21.

Ans. See pages 102, 103.

Q. Write short notes on" a divestitive fact " B. L. Jul. 16; Jul. 21. 'Respondeant Superior.' Jan. 11; Jul. 12.

Ans. See pages 105, 104.

Q. Write a historical note on testamentary succession B. L. Jun, 09; Jul. 10; Jan. 11.

Ans. See page 107.

Q. " A right which is at rest has to be studied with reference to its 'orbit' and its infringement " Explain. B. L. Jan. 18; Explain and illustrate. Jul. 23.

Ans. See pages 102—104.

CHAPTER X.

Private Law: Rights in Rem.

Q. Analyse the legal concept of ' possession ' and indicate how it is related to that of ' ownership.' B. L. Jan. 09 ; Jun. 09. Jan. 14 ; Jun. 15; Jun. 17; Aug. 18; Jan. 19 ; Jan. 23.

Ans. See pages 118—120, 126.

Q. Write a short note on the nature of legal possession. B. L. Jun. 16.

Ans. See page 120.

Q. Analyse the elements of " legal possession." How far is it necessary that the possessor should have " animus domini " or the intention to deal with the thing as owner? B. L. Jan. 22.

Ans. See pages 118—120.

Q. " Juridical possession is generally understood to consist of two elements, viz. power over the thing possessed and a corresponding will" —(Terry). Comment. B. L. Jan 25.

Ans. See pages 118—119.

Q. Discuss briefly the nature of *Jura in re aliena.* Explain the maxim *Nulla res sua servit.* B. L. Jan. 20.

Ans. See page 131. The maxim means that one cannot have a servitude upon one's own land.

Q. Is ' servitude ' a right? How are ' servitudes ' acquired and how are they extinguished? B. L. Jul. 24.

Ans. See pages 131 and F. N. on p 132, p 132 and the Roman Law.

Q. " The jurists of the Teutonic races seem never to have recognised the two grades of possession which

have given so much trouble to the civilians." Holland. Explain. B. L. Jul. 23.

Ans. See page 123.

Q. What are two kinds of possession in the Roman Law? Give examples thereof. What are Savigny's and Ihering's views on the Roman Law of possession? What are the Teutonic and English theories on the subject. B. L. Jan. 09 ; Jan. 13; Jun. 15

Ans. See pages 120—124.

Q. Explain what is meant by Possession and how it differs from Detention. Is the distinction recognised in English Law? B. L. Jul. 25.

Ans. See pages 118, 121 and 123.

Q. What are *Jura in re aliena*? Do any of the following come under this class, and, if so. why? (1) pledges, (2) leases, (3) licenses, and (4) easements. B. L. Jun. 20.

Ans. See pages 131, 133, 132.

Q. " In its lowest form it is a right of possession, in its highest form a right of Ownership. Analyse and explain both conceptions fully. B. L. Jan. 11 ; Jan. 21.

Ans. See pages 117—118, 127.

Q. Explain fully the difference between " the right to possess " and the " right to own." When and in what circumstances does the former develop into the latter? B. L. Jul. 24.

Ans. See pages 117—119 and 126—127.

Q. Define ownership. B. L. Jun. 09. Explain and illustrate any four of the different methods of acquiring ownership. B. L. Jul. 12.

Ans. See pages 127, 128—130.

Q. Analyse the legal conception of "ownership." B. L. Jan. 17.

Ans. See page 127.

Q. Analyse clearly the notion of ownership. Explain the nature of the special protection which the Law gives to possession giving reasons for the same. B. L. Jan. 10 ; Jul. 10.

Ans. See pages 127, 124.

Q. How is the right of original acquisition acquired with or without an act of possession? B. L. Jan. 99.

Ans. See page 129.

Q. Can you lawfully prevent any person from flying in an aeroplane over your land? B. L. Jun. 13.

Ans. Yes only so far as it interferes with your full enjoyment of your property. By the maxim *cujus est solum ejus usque ad coelum*, ownership and possession of land bring with them the ownership and possession of the column of space above the surface ad *infinitum*. The owner may build the Tower of Babel if he pleases, but it does not follow that an entry above the surface is in itself an actionable trespass. Such an extension of the rights of an owner would be an unreasonable restriction of the right of the public to the use of the atmospheric space. See 13 Q. B. D. 927.

Q. Explan and illustrate 'servitude.' B. L. Jan. 09 ; Jun. 17.

Ans. See pages 131—133.

Q. Enumerate the rights and duties associated with the family, clearly defining their respective characteristics. B. L. Jun. 20.

Ans. See pages 112—114.

Q. Classify and illustrate the antecedent rights in rem which are connected with the personality of the individual. B. L. Jun. 16.

Ans. See pages 111, 112.

Q. Illustrate shortly the different kinds of antecedent rights in rem. B. L. Jan. 20.

Ans. See pages 110—

Q. Write notes on—'Emphyteusis.' B. L. Jun. 17; Jul. 21; Jul. 25; 'usufruct.' B. L. Jan. 17; Jun. 17 *Jura in re aliena*. B. L. Jan. 21; Jul. 24; 'Servitude' B. L. Jul. 25; 'Real servitude.' B. L. Jul. 21; Jul. 23; 'Hypothec'. B. L. Jul. 23.

Ans. See pages 135, 133, 130, 134.

Q. "No liability for deceit can arise upon a statement made with an honest belief in its truth." Comment. B. L. Jul. 23.

Ans. See pages 136.. .....

CHAPTER XI.

Private Law: Rights in Personam.

Q. Analyse and explain the constituent elements of a contract. B. L. Jul. 12; Jun. 15.

Ans. See pages 148—152.

Q. Illustrate the constituent elements of a contract.

Ans. See pages 148—

Q. State and examine the objective theory of contracts B. L. Jan. 11; Jan. 13; Jun. 13; Jan. 14; Jun. 14, Jan. 15.

Ans. See pages 146—148.

Q. Explain the essential elements of a contract, Examine the objectve theory of contract. B. L. Jan. 24.

Ans. See pages 148—151 and 146—147.

Q. Discuss the different theories of contract Jan 10; Jun. 13?

Ans. See pages 145—148

Q. How far can a contract be regarded as the taking of a risk? B. L. Jan. 13; Jul. 13; Jul. 19.

Ans. See pages 145.

Q. Give after Holland a classification of contracts. B. L. Jan. 20.

Ans See pages 154—

Q. State and criticise Savigny's analaysis of a con tract. Jun. 08; Jun 17; Aug. 18 (With special reference to the English law of contract), Jan. 21; (and discuss whether 'a contract is not entered unless the will of the parties are really at one.' Jan. 23).

Ans. See pages 145—146 & F. N.

Q. What do you understand by a quasi-contract? B. L. Jan. 12; Jul. 21; Jan. 24.

Ans. See pages 139.

Q. State the law of Rome and of England regarding the transfer of an obligation. B. L. Jul. 08.

Ans. See pages 136, 163—164.

Q. Define wagering contract and give instances where such contracts are valid and where they are not. B. L. Jul. 08.

Ans. See page 160.

Q. Is consensus really necessary to the making of a contract? State and discuss Professor Holland's view. B. L. Jan. 16.

Ans. See pages 145—146, and F. N.

Q. What are the peculiarities of alienatory contract in different systems of law as explained by Holland? B. L. Jan. 16.

Ans. See pages 155—156.

Q. Enumerate and shortly describe the different kinds of accessory contracts. B. L. Jan. 16.

Ans. See pages 161—163.

Q. Write notes on Accessory Contracts. B. L. Jul. 21; 'Informal Contracts.'

Ans. See pages 161— ; 152—

Q. Give illustrations of the right which (a) any member of the community, (b) particular classes of persons, has or have to call upon a public official to exercise his functions on his or their behalf. B. L. Jan. 16

Ans. See page 144.

Q. Briefly state the circumstances which terminate contractual rights (B. L. Jul. 24), illustrating your answer where necessary. B. L. Jan. 21.

Ans. See pages 164, 165, 166.

Q. What are the various principles upon which contracts may, according to Professor Holland, be classified? B. L. Jan. 23.

Ans. See pages 154—155.

Q. "An obligation, as its etymology denotes, is a tie." Discuss this statement so as to bring out out fully the characteristics of obligation as a juridical concept. B. L. Jul. 25.

Ans. According to savigny, an obligation is the control over another person, yet not over this person in all respects (in which case his personality would be destroyed), but over single acts of his, which must be conceived of as subtracted from his free will, and subjected to our will. Thus obligation is a tie, whereby one person is bound to perform some acts for the benefit of another.

In some cases the two parties agree thus to be bound together, in other cases they are bound without their consent. In every case it is the Law which ties or unties the knot.

There are Cases in which a merely moral duty—what is known as 'natural obligation'—will incidentally receive legal recognition *e.g.*, if a person who owes a debt pays it in ignorance that it is barred by limitation, he will not be allowed to recover it back.

The Roman School of lawyers dealt with all rights in personam together under the comprehensive name of obligations, and included in it both antecedent and remedial rights. (Note here the distinction between obligation which is a right in personam and available against definite persons, and a right in rem which is available against the whole world).

Now five kinds of obligations are mentioned by the Roman lawyers and they correspond to the five kinds of

rights in personam arising respectively from (*i*) contracts, (*ii*) quasi-contracts, (*iii*) delicts and (*iv*) breach of contracts. See pages 138—139. Read also Miraglia's Comparative Legal Philosophy (Modern Legal Philosophy Series, III) pages 553.....

Q. What is the meaning of obligation in Roman Law? B. L. Jan. 25.

Ans. See above.

CHAPTER XII.

Private Law: Remedial Rights.

Q. "The object of a developed system of law is the conservation, whether by means of the tribunals or of permitted self-help of the rights, which it recognises as existing." B. L. Jan. 22.

Ans. See pages 168, 169.

Q. How may wrongful acts be classified? Which principle do you select, and why? B. L. Jan. 14; B. L. 15; Jun. 15.

Ans. See page 170.

Q. Trace the early history of delict and crime. B. L. Jun. 09; Jan. 10; Aug. 18; Jan. 19.

Ans. See pages 167—168. The distinction was unknown in very early times. All offences were sins punishable by divine vengeance.

Then offence against God was distinguished from offence against man. The latter was regarded as an offence avenged by the injured family upon the family of the wrong-doer. At the

next stage certain offences came to be atoned by money payment. In serious offences the offenders were expelled ; but expulsion prejudiced the king who lost fighting men. Hence offenders were allowed to return on payment of a fine to the king. This marks the differentiation between crime and delict. With the growth of the central power of the state the idea of Crime became developed.

Q. Classify rights in rem and give an example of each kind and of their violation. B. L. Jan. 09; Jul. 09.

Ans. See pages 171—172.

Q. A tabular view of wrongful acts in which each is referred to the right of which it is an infringement might easily be constructed Construct such a tabular view. B. L Jan. 11.

Ans. See page 172

Q. Distinguish between a tort and a crime. B. L. Jul. 08; Jan. 09; Jun. 09; Jul. 10; Jan. 12; Jan. 13; Jan. 17; Jun. 17; Aug. 18; Jan. 19; Jul. 21; Jan. 23; Jan. 24; Jul. 25.

Ans. See page 170

Q. Illustrate your answer by special reference to defamation. B. L Jan. 17; Jul. 19; by examples Jul. 25.

Ans. See page 170.

Q. How are remedies extinguished? B. L. Jan. 09.

Ans. See page 173.

Q. How would you classify torts. B. L. Jul. 08; Jun. 09; Jan. 13.

Ans. See page 171.

CHAPTER XIII.

Private Law: Abnormal.

Q. Explain and illustrate—normal person and abnormal person. B. L. Jan. 09.

Ans. See page 174.

Q. What are the principal causes of the chief varieties of status among natural persons, and give illustrations of any four of them. B. L. Jul. 08.

Ans. See pages 174—175.

Q. Write notes on—' corporation sole '; B. L. Jul. 12; Jan. 19.

Ans. See page 178.

Q. State the characteristics of artificial persons. (B. L. Jan. 25) giving a few examples. Is the Upiversity of Calcutta a person ? If so, natural or artificial ? Give reasons for your answer. B. L. Jun. 20.

Ans. See pages 176, 177.

Q. "The characteristics of artificial person differ from those of a group of natural persons no less than from those of a single natural person." Explain. B. L. Jan. 21; Jul. 23.

Ans. See page 176.

Q. Explain what is meant by *artificial persons* and state how they have been classified B. L. Jan. 25 and Jul. 25.

Ans. See pages 176—177.

CHAPTER XIV.

Adjective Private Law.

Q. Write short notes on—' abnormal adjective law.' B. L. Jun. 16; 'Adjective Law.' B. L. Jan. 17; Jun. 17; Jan. 21; Jul. 22.

Ans. See pages 174, 179

Q. "A remedial right is itself a mere potentiality." Holland. Develop.

Ans. A remedial right arises out of infringement of some antecedent right. It is with the help of adjective law that this right is realised. Thus when A beats B, the beating by itself will not bring the remedy unless it is sought by proper procedure. An antecedent right on the other hand produces the effect as soon as a particular fact takes place. Thus as soon as A dies, B, if his legal heir gets the property of A independent of any further act on his part. So one right is a mere potentiality and the other is an actuality.

CHAPTER XV.

Public Law.

Q. Criminal law as a branch of the Public Law is comparatively modern. Explain this. B. L. Jun. 16.

Ans. See page 183

Q. Indicate the province of Constitutional law. B. L. Jul. 21.

Ans. See page 182.

CHAPTER XVI.

International Law.

Q. International Law is the vanishing point of Jurisprudence. B. L. Jun. 09; Jul. 10; Jun. 13; Jun. 14; Jun. 16; Jul. 17; Jun. 20; Jul. 23.

Ans. See page 186.

Q. The law of nations is but private law writ large. Develop. B. L. Jul. 10; Jun. 11; Jan. 15; Jun. 15; Aug. 18; Jan. 19; Jul. 21

Ans. See page 186.

Q. "Although as being concerned with the relations of states, 'international law' is in a sense a department of public law, its analogies are rather to the private than to the public branches of law municipal." Holland. Explain B. L. Jan. 23

Ans. See page 186

Q. What is meant by antecedent international rights in rem? Classify them B. L. Jul. 08; Jun 13

Ans. See pages 187--188

Q. What are the rights and duties of neutrals. B L. Jun. 13. Write short notes on 'Rights of Neutrals'

Ans See page 190

Q. What is the objection to the term private international law? B. L Jan 13

Ans See page 185 (This phrase would mean a private species of the body of rules which prevails between one nation and another This is however not intended)

Q. "The antecedent rights of nations in personam are almost exclusively contractual." Explain. B L Jan. 16; Jan. 23.

Ans. See pages 188, 189

Q. Write a short note on the nature of International Law. B. L. Jul. 22.

Ans. See pages 185, 186

Q. Explain the following: (1) Public International Law (2) Law of Belligerency (3 Pacific Blockade. B. L. Jul. 19.

Ans. See pages 186—187, 189. Pacific Blockade is a species of general reprisals.

Q. Write short notes on "International law." B. L. Jun. 16.

Ans See page 185.

Q. Is International Law entitled to be called law? How does it differ from Positive Law? B. L. Jan. 24.

Ans. See pages 185 and 198—199 in Appendix A.

Q. Explain why "the realization of the civitas maxima of which theorists have dreamed, would be not the triumph but the extinction of International Law." B. L. Jan. 17; Jan. 19

Ans. International law governs the relations of independent states [illegible] A world-state would be a federation of states If international law develops so far as to produce a world state, the component factors will no longer remain independent states and International law would cease to be what it is. It will be the public law of the federation of states.

CHAPTER XVII.

The application of Law.

Q. Examine the theories regarding the proper forum for the punishment of an offence. B. L. Jun. 09.

Ans. See page 194.

Q. Discuss the question of a competent forum with regard to public law. B. L. Jun. 13.

Ans. See page 193.

Q. What circumstances affect the solution of the question as to the Lex applicable to any set of facts? B. L. Jun. 14

Ans See pages 192 195

Q. If an Arab in Calcutta assaults a Chinaman, by which law and where will he be tried? B L. Jun 14

Ans. See page 193

Q. Suppose an Afghani murders a Chinaman in Calcutta Where and by which law do you think he should be tried? B L Jun 09.

Ans See page 193

Q What is the theory of cosmopolitan justice? Give instances of and discuss its application B L Jan 19.

Ans. See page 194

Q. "Natural law or natural equity has been often called in, to justify a departure from the strict rules of positive law" Holland Explain B L Jul 25

Ans. See page 197.